

# RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice.
- E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

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## Office of Alcoholism and Substance Abuse Services

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### EMERGENCY RULE MAKING

#### Establishment, Incorporation and Certification of Providers of Substance Use Disorder Services

**I.D. No.** ASA-52-14-00003-E

**Filing No.** 1040

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Part 810; and addition of new Part 810 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.20, 19.20-a, 19.40, 32.02; Executive Law, section 296(15) and (16); Correction Law, art. 23-A; Civil Service Law, section 50; Protection of People with Special Needs Act, L. 2012, ch. 501

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012 Governor Andrew Cuomo signed the Protection of People with Special Needs Act (PPSNA; chapter 501 of the Laws of 2012); the statute created the Justice Center for the Protection of People with Special Needs (Justice Center) establishing various protections for vulner-

able persons, i.e., a new system for incident management in services operated or certified by OASAS; and new requirements for pre-employment background checks in OASAS certified and operated service providers, persons credentialed by the Office, and applicants for new operating certificates.

The amendments to Part 810, effective June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 are necessary to implement the criminal history background check provisions as this is a new process for OASAS. Additionally, by statute (Mental Hygiene Law sections 19.20 and 19.20-a) requires OASAS, rather than the Justice Center, to conduct reviews of criminal history information and to make recommendations regarding hiring, credentialing and certification. Amendments will also streamline the process of program certification for needed services and is consistent with Governor Cuomo and the Sage Commission's "Lean Initiative" to improve efficiency in state government.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals receiving services within the OASAS treatment system. If OASAS did not promulgate regulations on an emergency basis, the process for OASAS to conduct this new process would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by insufficient safeguards regarding entities receiving operating certificates from the Office. If OASAS did not promulgate regulations related to the "Lean Initiative" on an emergency basis, the process for OASAS and applicants for certification of new providers would become increasingly cumbersome due to timetables, records management, and protracted reviews of submissions.

OASAS is not able to use the regular rulemaking process established by the State Administrative Procedure Act because there is not sufficient time to develop and promulgate regulations within the necessary timeframes.

**Subject:** Establishment, Incorporation and Certification of Providers of Substance Use Disorder Services.

**Purpose:** To enhance protections for service recipients in the OASAS system.

**Substance of emergency rule:** The Proposed Rule would Repeal the current Part 810 and Replace it with a new Part 810 titled "Establishment, Incorporation and Certification of Providers of Substance Use Disorder Services." The new Part incorporates amendments to the Office's certification and review process consistent with statutory requirements, definitions and procedures of the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012); adds a new requirement that a majority of owners or principals of an applicant must have demonstrated prior experience in substance use disorder services, and that they shall require a criminal history information review prior to any final agency decision regarding certification or re-certification; and makes amendments which adopt recommendations developed by the Office in response to Governor Cuomo and the Sage Commission's "Lean Initiative" to streamline government processes and procedures. The Proposed Rule also makes technical amendments to standardize formatting and language usage for all Office regulations.

Amendments include:

Section 810.1 sets forth the background and intent and updates language referencing "substance use disorder"; removes language no longer applicable which was required to "grandfather" programs certified pursuant to prior regulations.

§ 810.2 sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services ("Office"); adds The Protection of People with Special Needs Act and statutes relating to required Criminal History Information reviews for all applicants for certification.

§ 810.4 adds new definitions or amends language to be consistent with the Justice Center: "criminal history information review", updates usage.

§ 810.5 and 810.6 eliminates the requirement of a full review for a

capital project proposed by a program that is not utilizing state funds from the DASNY Mental Hygiene bonding program; requires such proposals to receive an administrative review instead.

§ 810.7 requires a majority of applicants for certification or renewal to have demonstrated prior experience in substance use disorder treatment services; updates language related to corporate structure.

§ 810.8 amends requirements for the full review process of an application for certification to include required criminal history information review as a criteria for Office consideration whether or not to issue or renew and operating certificate; eliminates the “interim operating certificate” as it is not used; consolidates language related to due process for applicants denied certification; eliminates specific time frames for response and submission of documentation in a certification application and replaces them with “a reasonable time.” Amendments also introduce an interim “threshold review” by the Office to reduce retention of incomplete applications and reduce staff time needed to track and follow-up on incomplete submissions.

§ 810.9 amends requirements for the administrative review process of an application for certification to include required criminal history information review as a criteria for Office consideration whether or not to issue or renew and operating certificate; eliminates the “interim operating certificate” as it is not used; consolidates language related to due process for applicants denied certification; eliminates specific timeframes for response and submission of documentation and replaces them with “a reasonable time.”

§ 810.10 adds requirements for Office prior approval of any changes in programming or corporate structure post certification, including any reduction in the majority of owners or principals with prior substance use disorder treatment experience; eliminates specific timeframes for response and submission of documentation and replaces them with “a reasonable time.”

§ 810.11 consolidates language requiring cooperative review of any programs requiring review by both the Office and the Department of Health.

§ 810.12 strengthens Office control of management contracts entered into by providers of services; requires administrators of contractors to complete a criminal history information review; retains in the governing authority to authority to remove any custodian regardless of change in employment status.

§ 810.13 updates language related to the different levels of certification of substance use disorder services.

§ 810.14 adds requirement that staff credentials and employee or contractor compliance with the criminal history information review requirements are part of the inspection and review process for recertification.

§ 810.16 consolidates language related to voluntary termination of authorized services.

§ 810.18 removes provisions for waiver; adds severability language.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Sara Osborne, Sr. Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: [Sara.Osborne@oasas.ny.gov](mailto:Sara.Osborne@oasas.ny.gov)

#### Regulatory Impact Statement

##### 1. Statutory Authority:

(a) Protection of People with Special Needs Act, Chapter 501 of the Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and review criminal history information related to employees or volunteers of treatment facilities certified, licensed, funded or operated by the Office.

(d) Section 19.20-a of the MHL authorizes the Office to receive and review criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Subdivisions (15) and (16) of Section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.

(g) Civil Service Law § 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.

(h) Article 23-A of the Corrections Law provides the factors to be considered concerning a person’s previous criminal convictions in making a determination regarding employment and the issuance of a license.

#### 2. Legislative Objectives:

The legislative objectives are the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems.

The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501’s provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A vulnerable persons’ central register contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Persons having committed egregious or repeated acts of abuse or neglect are prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

Additional amendments adopt recommendations developed by the Office in response to Governor Cuomo and the Sage Commission’s “Lean Initiative” to streamline government processes and procedures. The amendments eliminate specific time frames for response and submission of documentation in a certification application and replace them with “a reasonable time.” Amendments also introduce an interim “threshold review” by the Office to reduce retention of incomplete applications and reduce staff time needed to track and follow-up on incomplete submissions. Amendments to the regulation serve as notice to the public of such changes in application processes.

#### 3. Needs and Benefits:

OASAS is proposing to adopt the following regulation because The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires that criminal history information reviews be conducted on each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services (“OASAS” or “Office”) who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities and any individual seeking to be credentialed by the Office.

This legislation adds a new requirement that a majority of owners or principals of a provider demonstrate prior experience in substance use disorder treatment and also requires principals or applicants for certification to comply with requirements for a criminal history information review. The legislation is intended to enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and properly trained individuals who own and operate OASAS facilities and programs, by verifying criminal history information received for individuals to operate such programs.

OASAS is proposing to adopt these amendments to the certification application and review process because they will reduce administrative time spent tracking incomplete submissions and retaining and organizing incomplete submissions or those that are not serious about becoming providers.

The legislation also makes technical amendments to make language and format consistent throughout OASAS regulations.

#### 4. Costs:

The Office anticipates no fiscal impact on providers or local governments, job creation or loss. No additional administrative costs to the agency are anticipated; no additional costs to programs/providers are anticipated.

#### 5. Paperwork:

The proposed regulation will require some additional information to be reported to the agency by applicants for certification. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs. The proposed “Lean Initiative” amendments will reduce agency paperwork and storage of incomplete applications.

#### 6. Local Government Mandates:

To the extent local governments already conduct criminal history information reviews on municipal employees, there are no new local govern-

ment mandates if a local government was to apply for certification; "Lean Initiative" amendments impose no local government mandates.

7. Duplications:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule.

8. Alternatives:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires the adoption of this proposed regulation; failure to adopt the "Lean Initiative" amendments would continue to subject applicants and Office personnel to inefficient and cumbersome processes and procedures.

9. Federal Standards:

These amendments do not conflict with federal standards.

10. Compliance Schedule:

The regulations will be effective on June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 to ensure compliance with Chapter 501 of the Laws of 2012 and Governor Cuomo's "Lean Initiative" and Sage Commission mandates.

**Regulatory Flexibility Analysis**

1. Effect of the rule:

OASAS services are provided by programs of varying size in every county in New York State; some counties are also certified service providers. The proposed Rule has been reviewed by OASAS in consideration of its impact on applications for service providers of all sizes and on local governments; additionally this regulation has been reviewed by the OASAS Advisory Council which consists of providers and stakeholders of all sizes and municipalities.

2. Compliance requirements:

The proposed Rule requires persons who apply to the Office for certification to operate a treatment program to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification; amendments also streamline the application review process by the agency by affording flexibility in time schedules and a threshold review prior to a substantive review.

3. Professional services:

The Office will retain documentation of such applicant review; this will not be an additional recordkeeping requirement for applicants or the Office. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

4. Compliance costs:

Because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, individual or municipal applicants will not be affected in any way. Many municipalities already conduct criminal history information reviews on prospective employees.

5. Economic and technological feasibility:

Implementation of the rule will require computer and email capability; all applicants in all regions of the state, both private and public sector, have such capability. No upgrades of hardware or software will be required. Also because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, and increasingly communicated electronically any additional recordkeeping will be minimal regardless of geographic location.

6. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on applicants, local governments or small businesses; therefore, it is designed on its face to minimize adverse impact.

7. Small business and local government participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in both public and private sectors, of all sizes and in diverse geographic locations. The Office has prepared webinars and guidance documents for applicant use and for training agency administration.

**Rural Area Flexibility Analysis**

1. Rural areas in which the rule will apply (types and estimated number of rural areas):

OASAS services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Sche-

nectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed Rule requires persons who apply to the Office for certification to operate a treatment program to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification, credentialing or hiring.

The Office will retain documentation of such review; this will not be an additional recordkeeping requirement for applicants or the Office. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

3. Costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed and the Office and applicants are involved, not programs. Applicants will pay for their own processing regardless of geographic.

4. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers in rural areas; therefore, it is designed on its face to minimize adverse impact.

5. Rural area participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

**Job Impact Statement**

OASAS is not submitting a Job Impact Statement for these amendments because OASAS does not anticipate a substantial adverse impact on jobs and employment opportunities.

The proposed regulation requires persons who apply to the Office for certification to operate a treatment program, or persons who are principals or operators of an entity applying for certification, to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification. Operating certificates are also issued contingent on compliance with other laws and regulations, including those promulgated by the Justice Center.

The proposed regulation has been presented to, and approved by, the OASAS Advisory Council and to the Behavioral Health Services Advisory Council consisting of providers and other stakeholders from a range of corporate types and municipalities. It is not anticipated that this regulation will have an adverse impact on existing jobs or the development of new employment opportunities for New York residents. It is anticipated that the proposed regulation will not have an adverse impact on existing employees in the field of fingerprinting or history review. The proposed regulations should not impact the number of criminal history information reviews requested via federal and state existing database. The Office is unable to determine what affect the proposed regulation may have on the employment of independent fingerprinting services or Office employees in the future.

The proposed regulation does not have an adverse impact on jobs or employment opportunities anywhere in the State, therefore, no region is disproportionately affected by the proposed regulation. This regulation will not require additional professional staff in existing certified providers; although entities will be required to maintain some records related to staff background, these should be minimal because much of the record exchange will be accomplished electronically.

The proposed regulation will have no adverse impact on existing jobs or the development of new employment opportunities. It is not anticipated that the proposed rule will affect the number of persons or entities applying for certification as operators of treatment service providers.

**EMERGENCY  
RULE MAKING**

**Criminal History Information Reviews**

**I.D. No.** ASA-52-14-00004-E

**Filing No.** 1041

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 805 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.20, 19.20-a, 19.40, 32.02; Executive Law, section 296(15) and (16); Corrections Law, art. 23-A; Civil Service Law, section 50; Protection of People with Special Needs Act (L. 2012, ch. 501)

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012 Governor Andrew Cuomo signed the Protection of People with Special Needs Act (PPSNA; chapter 501 of the Laws of 2012); the statute created the Justice Center for the Protection of People with Special Needs (Justice Center) establishing various protections for vulnerable persons, i.e., a new system for incident management in services operated or certified by OASAS; and new requirements for pre-employment background checks in OASAS certified and operated service providers, persons credentialed by the Office, and applicants for new operating certificates.

The addition of Part 805, effective June 30, 2013, and subsequently effective September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 is necessary to implement the criminal history background check provisions as this is a new process for OASAS. Additionally, by statute (Mental Hygiene Law sections 19.20 and 19.20-a) requires OASAS, rather than the Justice Center, to conduct reviews of criminal history information and to make recommendations regarding hiring, credentialing and certification.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals receiving services within the OASAS treatment system. If OASAS did not promulgate regulations on an emergency basis, the process for OASAS and its providers to conduct this new process would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from requirements differing for other agencies covered by the Justice Center.

OASAS was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes.

**Subject:** Criminal History Information Reviews.

**Purpose:** To enhance protections for service recipients in the OASAS system.

**Substance of emergency rule:** The Proposed Rule would ADD a new Part 805 titled "Criminal History Information Reviews." The new Part incorporates into regulation requirements of sections 19.20 and 19.20-a of the mental hygiene law added by the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) which outlines the process for the Office to conduct such reviews of prospective custodians and applicants for certification or credentialing. Amendments include:

Section 805.1 sets forth the background and intent consistent with the intent of the Protection of People with Special Needs Act (Chapter 501 of the laws of 2012).

§ 805.2 indicates those persons or "applicants" to whom this regulation is applicable and who is excluded.

§ 805.3 sets for the statutory basis for the regulation in the executive law, mental hygiene law, corrections law, and civil service law.

§ 805.4 defines terms used in this regulation: "applicant", "authorized person", "commissioner", "criminal history information", "designated fingerprinting entity", "Division" of Criminal Justice Services, "Justice Center", "natural person", "prospective employee", "prospective volunteer", "operator", "provider of services", "subject individual."

§ 805.5 sets forth in regulation the process involving the Office, a prospective employee or volunteer, the Justice Center and the Division in relation to acquiring fingerprints necessary for a criminal history information review by the Office; allows for temporary approval of an employment or volunteer applicant in some cases; requires providers to establish policies and procedures consistent with this regulation.

§ 805.6 sets forth in regulation the process involving the Office, an applicant for certification or credentialing, the Justice Center and the Division in relation to acquiring fingerprints necessary for a criminal history information review by the Office; requires providers to establish policies and procedures consistent with this regulation and to submit to the Office a criminal background check form.

§ 805.7 sets forth in regulation the process for the Office's conduct of a criminal history review for purposes of approval or denial of an application for employment, volunteering, certification or credentialing, such review to be consistent with the criteria in Article 23-A of the corrections law.

§ 805.8 sets forth standards for documentation and confidentiality.

§ 805.9 sets forth process for notification to the Office of any subsequent criminal charges or convictions related to a custodian, principal of a certified program, or credentialed person.

§ 805.10 sets forth the responsibilities of providers of services related to recordkeeping, notifications, retention and disposal of information.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Sara Osborne, Sr. Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: [Sara.Osborne@oasas.ny.gov](mailto:Sara.Osborne@oasas.ny.gov)

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

(a) Protection of People with Special Needs Act, Chapter 501 of the Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and review criminal history information related to employees or volunteers of treatment facilities certified, licensed, funded or operated by the Office.

(d) Section 19.20-a of the MHL authorizes the Office to receive and review criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Subdivisions (15) and (16) of Section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.

(g) Civil Service Law § 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.

(h) Article 23-A of the Corrections Law provides the factors to be considered concerning a person's previous criminal convictions in making a determination regarding employment and the issuance of a license.

##### 2. Legislative Objectives:

The legislative objectives are the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems.

The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A vulnerable persons' central register contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Persons having committed egregious or repeated acts of abuse or neglect are prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

##### 3. Needs and Benefits:

OASAS is proposing to adopt the following regulation because criminal history information reviews conducted on each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services ("OASAS" or "Office") who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities and any individual seeking to be credentialed by the Office will be sufficiently screened before such contact with patients, ensuring a safe and therapeutic environment.

The legislation is intended to enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and

properly trained individuals to staff their facilities and programs, by verifying criminal history information received for individuals seeking employment or volunteering their services and those credentialed by the Office.

#### 4. Costs:

The Office will require additional staffing to review any criminal history information found to contain convictions. The Office anticipates no fiscal impact on providers or local governments, job creation or loss, because the Office will subsidize the cost of fingerprint production for applicants and prospective employees/volunteers of not-for-profit programs.

#### 5. Paperwork:

The proposed regulation will require some additional information to be reported to the agency by providers regarding potential employees and/or volunteers, and by applicants for certification and/or credentialing. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

#### 6. Local Government Mandates:

To the extent local governments already conduct criminal history information reviews on municipal employees, there are no new local government mandates.

#### 7. Duplications:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule.

#### 8. Alternatives:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires the adoption of this proposed regulation.

#### 9. Federal Standards:

These amendments do not conflict with federal standards.

#### 10. Compliance Schedule:

The regulations will be effective on June 30, 2013 and subsequently on September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 to ensure compliance with Chapter 501 of the Laws of 2012.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the rule:

OASAS services are provided by programs of varying size in every county in New York State; some counties are also certified service providers. The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers of all sizes and on local governments, whether or not they are certified operators; additionally this regulation has been reviewed by the OASAS Advisory Council which consists of providers and stakeholders of all sizes and municipalities.

#### 2. Compliance requirements:

The proposed Rule requires persons who apply to the Office for certification to operate a treatment program, persons who apply to the Office for a credential, and prospective employees and volunteers of certified treatment providers to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification, credentialing or hiring.

#### 3. Professional services:

Providers will be required to retain documentation of fingerprint requests for employees, contractors of volunteers they ultimately employ; this will not be a significant additional recordkeeping requirement for personnel records they are already required to retain. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

#### 4. Compliance costs:

Because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, smaller providers or municipal providers will not be affected in any way. Many municipalities already conduct criminal history information reviews on prospective employees.

Although providers will be required to retain documentation of fingerprint requests for employees, contractors, or volunteers they ultimately employ, this will not be a significant additional recordkeeping requirement because providers are already required to retain records related to such relationships. No additional professional services will be required of as a result of these amendments; nor will the amendments add to the professional service needs of local governments. Because of the electronic nature of the transactions, minimal paperwork will be involved on the part of business or local governments.

The Office will subsidize applicants for all prospective employees or volunteers of not-for-profit providers, regardless of geographic location; there will be no disparate impact on providers based on location, size of business or municipality.

#### 5. Economic and technological feasibility:

Implementation of the rule will require computer and email capability;

all providers in all regions of the state, both private and public sector, already have such capability. No upgrades of hardware or software will be required. Also because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, and increasingly communicated electronically any additional recordkeeping will be minimal regardless of geographic location.

#### 6. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers on local governments or small businesses; therefore, it is designed on its face to minimize adverse impact.

#### 7. Small business and local government participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in both public and private sectors, of all sizes and in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

8. Not applicable. (establish or modify a violation or penalties associated with a violation)

### **Rural Area Flexibility Analysis**

1. Rural areas in which the rule will apply (types and estimated number of rural areas):

OASAS services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schoharie, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed Rule requires persons who apply to the Office for certification to operate a treatment program, persons who apply to the Office for a credential, and prospective employees and volunteers of certified treatment providers to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification, credentialing or hiring.

Providers will be required to retain documentation of fingerprint requests for employees, contractors of volunteers they ultimately employ; this will not be a significant additional recordkeeping requirement for personnel records they are already required to retain. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

#### 3. Costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed. Also, the Office will subsidize the cost of fingerprinting for all applicants for employment in not-for-profit providers; all other applicants will pay for their own processing regardless of geographic.

#### 4. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers in rural areas; therefore, it is designed on its face to minimize adverse impact.

#### 5. Rural area participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

### **Job Impact Statement**

OASAS is not submitting a Job Impact Statement for these amendments because OASAS does not anticipate a substantial adverse impact on jobs and employment opportunities.

The proposed regulation requires persons who apply to the Office for certification to operate a treatment program, persons who apply to the Office for a credential, and prospective employees and volunteers of certified treatment providers to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification, credentialing or hiring.

The proposed regulation will not have an adverse impact on existing jobs or the development of new employment opportunities for New York

residents. It is anticipated that the proposed regulation will not have an adverse impact on existing employees in the field of fingerprinting or history review. The proposed regulations should not impact the number of criminal history information reviews requested via federal and state existing database. The Office is unable to determine what affect the proposed regulation may have on the employment of independent fingerprinting services or Office employees in the future.

The proposed regulation does not have an adverse impact on jobs or employment opportunities anywhere in the State, therefore, no region is disproportionately affected by the proposed regulation.

The proposed regulation will have no adverse impact on existing jobs or the development of new employment opportunities.

## EMERGENCY RULE MAKING

### Patient Rights

**I.D. No.** ASA-52-14-00005-E

**Filing No.** 1042

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Part 815; and addition of new Part 815 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.20, 19.20-a, 19.40, 32.02; Executive Law, section 296(15) and (16); Corrections Law, art. 23-A; Civil Service Law, section 50; Protection of People with Special Needs Act, L. 2012, ch. 501

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012 Governor Andrew Cuomo signed the Protection of People with Special Needs Act (PPSNA; chapter 501 of the Laws of 2012); the statute created the Justice Center for the Protection of People with Special Needs (Justice Center) establishing various protections for vulnerable persons, i.e., a new system for incident management in services operated or certified by OASAS; and new requirements for pre-employment background checks in OASAS certified and operated service providers, persons credentialed by the Office, and applicants for new operating certificates.

The repeal and addition of Part 815 related to Patient Rights, effective June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 is necessary to implement the criminal history background check provisions as this is a new process for OASAS and to make patients aware of additional rights. Additionally, by statute (Mental Hygiene Law sections 19.20 and 19.20-a) requires OASAS, rather than the Justice Center, to conduct reviews of criminal history information and to make recommendations regarding hiring, credentialing and certification.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals receiving services within the OASAS treatment system. If OASAS did not promulgate regulations on an emergency basis, the processes for OASAS, its providers and service recipients would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from requirements differing for other agencies covered by the Justice Center.

OASAS was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes.

**Subject:** Patient Rights.

**Purpose:** To enhance protections for service recipients in the OASAS system.

**Substance of emergency rule:** The Proposed Rule would Repeal the current Part 815 and Replace it with a new Part 815. The new Part incorporates amendments related to rights and obligations of patients in OASAS certified programs consistent with statutory requirements, definitions and procedures of the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012).

The Proposed Rule also makes technical amendments to standardize formatting and language for all Office regulations. Amendments related to the Justice Center include:

Section 815.1 sets forth the background and intent and adds language consistent with statutory requirements, definitions and procedures of the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012).

§ 815.2 sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services (“Office”); adds The Protection of People with Special Needs Act; removes repealed statutes; adds the Vulnerable Persons Central Register in § 492 of the social services law.

§ 815.3 amends applicability of this Part to be consistent with Justice Center statute and regulations.

§ 815.4 adds to “provider requirements” language consistent with statutory requirements, definitions and procedures of the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012; requires posting of the toll-free hotline to the Vulnerable Persons Central Registry; requires policies and procedures for, and implementation of, training for all “custodians” related to requirements of the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) including the Code of Conduct.

§ 815.5 adds language which explicitly requires provider compliance with the amended Patient Rights as a condition of receiving and maintaining an operating certificate to operate an Office service program.

§ 815.10 amends reference to a “strip search” as a reportable incident to be referenced as a “significant incident” pursuant to Justice Center definitions.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Sara Osborne, Sr. Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: [Sara.Obosrne@oasas.ny.gov](mailto:Sara.Obosrne@oasas.ny.gov)

### Regulatory Impact Statement

#### 1. Statutory Authority:

(a) Protection of People with Special Needs Act, Chapter 501 of the Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and review criminal history information related to employees or volunteers of treatment facilities certified, licensed, funded or operated by the Office.

(d) Section 19.20-a of the MHL authorizes the Office to receive and review criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Subdivisions (15) and (16) of Section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.

(g) Civil Service Law § 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.

(h) Article 23-A of the Corrections Law provides the factors to be considered concerning a person’s previous criminal convictions in making a determination regarding employment and the issuance of a license.

#### 2. Legislative Objectives:

The legislative objectives are the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems.

The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501’s provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A vulnerable persons’ central register contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to

challenge those findings. Persons having committed egregious or repeated acts of abuse or neglect are prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

### 3. Needs and Benefits:

This regulation governs the rights and responsibilities of patients in OASAS certified treatment programs. The regulation incorporates provisions of Chapter 501 of the Laws of 2012 to the extent they relate to patients' rights to report allegations of abuse and neglect or other significant incidents to the Vulnerable Persons Hotline. The requirement for staff, operators, volunteers and contractors, if appropriate, to have completed criminal history information reviews is incorporated as a right of patients to receive treatment in an environment that is therapeutic and free from concerns about harm from staff.

OASAS is proposing to adopt the following regulation because criminal history information reviews conducted on each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services ("OASAS" or "Office") who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities and any individual seeking to be credentialed by the Office will be sufficiently screened before such contact with patients, ensuring a safe and therapeutic environment.

The legislation is intended to enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received for individuals seeking employment or volunteering their services and those credentialed by the Office.

### 4. Costs:

The Office anticipates no fiscal impact on providers or local governments, job creation or loss, because the Office will subsidize applicants and prospective employees/volunteers in not for profit providers for the cost of fingerprint production.

### 5. Paperwork:

The proposed regulation will require some additional information to be reported to the agency by applicants for employment or management contractors. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs. No additional paperwork will be required as it applies to patients.

### 6. Local Government Mandates:

To the extent local governments already conduct criminal history information reviews on municipal employees, there are no new local government mandates if a local government was to apply for certification. Municipalities that are program operators will also need to comply with the same rights of their patients as any other certified operator.

### 7. Duplications:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule.

### 8. Alternatives:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires the adoption of this proposed regulation.

### 9. Federal Standards:

These amendments do not conflict with federal standards.

### 10. Compliance Schedule:

The regulations will be effective on June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 to ensure compliance with Chapter 501 of the Laws of 2012.

## **Regulatory Flexibility Analysis**

### 1. Effect of the rule:

OASAS services are provided by programs of varying size in every county in New York State; some counties are also certified service providers. The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers of all sizes and on local governments, whether or not they are certified operators; additionally this regulation has been reviewed by the OASAS Advisory Council which consists of providers and stakeholders of all sizes and municipalities.

### 2. Compliance requirements:

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior.

The proposed regulation incorporates provisions from this Act into the OASAS Patient Rights regulation which applies to all programs throughout the state in all geographic locations. Because the regulation applies only to

the rights and responsibilities of patients in certified programs, there is no different application in any geographic location.

### 3. Professional services:

Providers will be required to retain documentation of fingerprint requests for employees, contractors of volunteers they ultimately employ; this will not be a significant additional recordkeeping requirement for personnel records they are already required to retain. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

### 4. Compliance costs:

Because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, smaller providers or municipal providers will not be affected in any way. Many municipalities already conduct criminal history information reviews on prospective employees.

Although providers will be required to retain documentation of fingerprint requests for employees, contractors, or volunteers they ultimately employ, this will not be a significant additional recordkeeping requirement because providers are already required to retain records related to such relationships. No additional professional services will be required of as a result of these amendments; nor will the amendments add to the professional service needs of local governments. Because of the electronic nature of the transactions, minimal paperwork will be involved on the part of business or local governments.

The Office will subsidize applicants for all prospective employees or volunteers of not-for-profit providers, regardless of geographic location; there will be no disparate impact on providers based on location, size of business or municipality.

### 5. Economic and technological feasibility:

Implementation of the rule will require computer and email capability; all providers in all regions of the state, both private and public sector, already have such capability. No upgrades of hardware or software will be required. Also because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, and increasingly communicated electronically any additional recordkeeping will be minimal regardless of geographic location.

### 6. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers on local governments or small businesses; therefore, it is designed on its face to minimize adverse impact.

### 7. Small business and local government participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in both public and private sectors, of all sizes and in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

## **Rural Area Flexibility Analysis**

1. Rural areas in which the rule will apply (types and estimated number of rural areas):

OASAS services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schoenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior. The proposed regulation incorporates provisions from this Act into the OASAS Patient Rights regulation which applies to all programs throughout the state in all geographic locations. Because the regulation applies only to the rights and responsibilities of patients in certified programs, there is no different application in any geographic location.

### 3. Costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed. Also, the Office will subsidize the cost of fingerprinting for all ap-

plicants for employment in not-for-profit providers; all other applicants will pay for their own processing regardless of geographic.

4. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers in rural areas; therefore, it is designed on its face to minimize adverse impact.

5. Rural Area participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

**Job Impact Statement**

OASAS is not submitting a Job Impact Statement for these amendments because OASAS does not anticipate a substantial adverse impact on jobs and employment opportunities.

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior. This regulation incorporates any relevant provisions into the OASAS Patient Rights regulation.

The proposed regulation will not have an adverse impact on existing jobs or the development of new employment opportunities for New York residents because it is narrowly related to the rights and obligations of patients while they are in OASAS certified problems. It is anticipated that the proposed regulation will not have an adverse impact on existing employees in the field of substance use disorder treatment, nor affect any reduction or increase in the number of positions available in the future.

The proposed regulation does not have an adverse impact on jobs or employment opportunities anywhere in the State, therefore, no region is disproportionately affected by the proposed regulation.

The proposed regulation will have no adverse impact on existing jobs or the development of new employment opportunities. It is not anticipated that the proposed rule will affect the number of persons applying for employment.

## EMERGENCY RULE MAKING

### Credentialing of Addictions Professionals

**I.D. No.** ASA-52-14-00006-E

**Filing No.** 1043

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Part 853; and addition of new Part 853 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.20, 19.20-a, 19.40 and 32.02; Executive Law, section 296(15) and (16); Corrections Law, art. 23-A; Civil Service Law, section 50; Protection of People with Special Needs Act (L. 2012, ch. 501)

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012 Governor Andrew Cuomo signed the Protection of People with Special Needs Act (PPSNA; chapter 501 of the Laws of 2012); the statute created the Justice Center for the Protection of People with Special Needs (Justice Center) establishing various protections for vulnerable persons, i.e., a new system for incident management in services operated or certified by OASAS; and new requirements for pre-employment background checks in OASAS certified and operated service providers, persons credentialed by the Office, and applicants for new operating certificates.

The amendments to Part 853, effective June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 are necessary to implement the new process of criminal history background checks into the credentialing process for addictions professionals credentialed by OASAS. Additionally, by statute (Mental Hygiene Law sections 19.20 and 19.20-a) requires OASAS, rather than the Justice Center, to conduct reviews of criminal history information and to make recommendations regarding hir-

ing, credentialing and certification so OASAS will be more involved in credentialing decisions.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals receiving services within the OASAS treatment system. If OASAS did not promulgate regulations on an emergency basis, the process for OASAS to implement this new process would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting inconsistent credentialing standards.

OASAS was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes.

**Subject:** Credentialing of Addictions Professionals.

**Purpose:** To enhance protections for service recipients in the OASAS system.

**Substance of emergency rule:** The Proposed Rule would Repeal the current Part 853 and Replace it with a new Part 853. The new Part incorporates amendments related to required Criminal History Information reviews of all applicants for credentials issued by the Office on or after June 30, 2013, such reviews required by the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012).

The Proposed Rule also makes technical amendments to standardize formatting for all Office regulations. Amendments related to the Justice Center include:

Section 853.1 sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services ("Office"); adds The Protection of People with Special Needs Act.

§ 853.3 adds new definition of "Criminal history information" and "custodian" as defined in Chapter 501/2012.

§ 853.5 adds requirements for criminal history information reviews of all applicants for new, renewal or reinstated certified alcoholism and substance abuse counselor ("CASAC") credentials; adds requirement for compliance by CASACs with a Code of Conduct for "custodians" in all OASAS service providers; "grandfathers" currently credentialed persons until application for renewal or reinstatement, application for a position or a new position in an Office certified service provider.

§ 853.6 adds requirements for criminal history information reviews of all applicants for new, renewal or reinstated certified alcoholism and substance abuse counselor trainee ("CASAC-T") credentials; adds requirement for compliance by CASAC-Ts with a Code of Conduct for "custodians" in all OASAS service providers.

§ 853.7 adds requirements for criminal history information reviews of all applicants for new, renewal or reinstated credentialed prevention professional ("CPP") credentials; adds requirement for compliance by CPPs with a Code of Conduct for "custodians" in all OASAS service providers.

§ 853.8 adds requirements for criminal history information reviews of all applicants for new, renewal or reinstated credentialed prevention specialist ("CPS") credentials; adds requirement for compliance by CPSs with a Code of Conduct for "custodians" in all OASAS service providers.

§ 853.9 adds requirements for criminal history information reviews of all applicants for new, renewal or reinstated credentialed problem gambling counselor ("CPGC") credentials; adds requirement for compliance by CPGCs with a Code of Conduct for "custodians" in all OASAS service providers.

§ 853.10 sets forth the application process for all credentials, including required criminal history information reviews and compliance with Justice Center Code of Conduct.

§ 853.17 adds requirements for periodic updates of criminal history information reviews of all persons holding a credential issued by the Office.

§ 853.18 adds requirements for criminal history information reviews of all applicants for new, renewal or reinstated credentials issued by the Office.

§ 853.19 adds requirements for criminal history information reviews and compliance with the Justice Center Code of Conduct of all applicants for credentialing based on reciprocity.

§ 853.20 adds non-compliance with the Justice Center Code of Conduct to the standards for misconduct.

§ 853.22 adds reference to the Justice Center Code of Conduct in relation to penalties for misconduct.

§ 853.23 adds reference to the Justice Center Code of Conduct in relation to complaints filed against credentialed persons.

§ 853.28 adds reference to the Justice Center Code of Conduct in relation to the Affidavit of Ethical Principles.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services (OASAS), 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: Sara.Osborne@oasas.ny.gov

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

(a) Protection of People with Special Needs Act, Chapter 501 of the Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and review criminal history information related to employees or volunteers of treatment facilities certified, licensed, funded or operated by the Office.

(d) Section 19.20-a of the MHL authorizes the Office to receive and review criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Subdivisions (15) and (16) of Section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.

(g) Civil Service Law § 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.

(h) Article 23-A of the Corrections Law provides the factors to be considered concerning a person's previous criminal convictions in making a determination regarding employment and the issuance of a license.

##### 2. Legislative Objectives:

The legislative objectives are the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems.

The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A vulnerable persons' central register contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Persons having committed egregious or repeated acts of abuse or neglect are prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

The proposed Rule requires persons who apply to the Office for a credential issued by the Office comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) regarding a criminal history information review prior to certification, credentialing or hiring, and compliance with a Code of Conduct established by the Justice Center.

##### 3. Needs and Benefits:

OASAS is proposing to adopt the following regulation because The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires that allegations of abuse and neglect, and other significant incidents be reported to the Justice Center Vulnerable Persons Central Register via the toll free hotline. OASAS credentials addiction, prevention, and compulsive gambling professionals who will be affected by the Justice Center oversight as they work in OASAS certified facilities. This legislation conforms OASAS regulations to definitions, reporting, documentation and review requirements of the Justice Center. The legislation strengthens the role of the Incident Review Committee and links compliance with reporting and investigating incidents to a providers operating certificate renewal. Criminal history information reviews will be conducted on each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services ("OASAS" or "Office")

who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities and any individual seeking to be credentialed by the Office. This will include OASAS credentialed professionals who will also be required to comply to an additional Code of Conduct of the Justice Center which could subject those persons to additional reasons for limitation or loss of their credential or their future employment in other covered agencies throughout New York State.

The legislation is intended to enable the Office to more thoroughly and efficiently monitor the quality and competency of its credentialed professionals and enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received for individuals seeking employment or volunteering their services and those credentialed by the Office.

The legislation also makes technical amendments to make language and format consistent throughout OASAS regulations.

##### 4. Costs:

The Office anticipates no fiscal impact on providers, or local governments, job creation or loss.

##### 5. Paperwork:

The proposed regulatory amendments will require limited additional information to be reported to the Justice Center by applicants and mandated reporters and documentation retained by providers. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

##### 6. Local Government Mandates:

This regulation imposes no new mandates on local governments operating certified OASAS programs even if they employ OASAS credentialed professionals.

##### 7. Duplications:

This proposed rule does not duplicate any State or federal statute or rule.

##### 8. Alternatives:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires the adoption of this proposed regulation.

##### 9. Federal Standards:

These amendments do not conflict with federal standards.

##### 10. Compliance Schedule:

The regulations will be effective on June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 to ensure compliance with Chapter 501 of the Laws of 2012.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of the rule:

OASAS credentials persons in the areas of substance use disorder counseling, problem gambling counseling, and prevention counseling to work in OASAS certified programs. Services are provided by programs of varying size in every county in New York State; some counties are also certified service providers. The proposed Rule has been reviewed by OASAS in consideration of its impact on applications for credentialed professionals, on local governments; additionally this regulation has been reviewed by the OASAS Advisory Council which consists of providers and stakeholders of all sizes and municipalities.

##### 2. Compliance requirements:

The proposed Rule requires persons who apply to the Office for a credential issued by the Office comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) regarding a criminal history information review prior to certification, credentialing or hiring, and compliance with a Code of Conduct established by the Justice Center. The Office will retain documentation of such review; this will not be an additional recordkeeping requirement for applicants or the Office. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost. Credentialed persons must already comply with a code of ethics; it is not anticipated that additional character and competence requirements will increase or decrease the number of applicants or have an impact on the number of employment opportunities regardless of geographic location. Because these changes are statewide no region will experience any adverse impact because of population density or geography.

##### 3. Professional services:

The Office will retain documentation of such applicant review; this will not be an additional recordkeeping requirement for applicants or the Office. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location.

No new professional services are required; no professional services will be lost.

4. Compliance costs:

Because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, individual or municipal applicants will not be affected in any way. Many municipalities already conduct criminal history information reviews on prospective employees. Applicants for certification and re-certification will pay for their own processing.

5. Economic and technological feasibility:

Implementation of the rule will require computer and email capability; all applicants in all regions of the state, both private and public sector, have such capability. No upgrades of hardware or software will be required. Also because every region of the state has resources for gathering fingerprints, and the history information collection is done electronically from a central state or federal database, and increasingly communicated electronically any additional recordkeeping will be minimal regardless of geographic location.

6. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on applicants, local governments or small businesses; therefore, it is designed on its face to minimize adverse impact.

7. Small business and local government participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in both public and private sectors, of all sizes and in diverse geographic locations. The Office has prepared webinars and guidance documents for applicant use and for training agency administration.

**Rural Area Flexibility Analysis**

1. Rural areas in which the rule will apply (types and estimated number of rural areas):

OASAS services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schoenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed Rule requires persons who apply to the Office for a credential issued by the Office to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) regarding a criminal history information review prior to certification, credentialing or hiring, and compliance with a Code of Conduct established by the Justice Center. The Office will retain documentation of such review; this will not be an additional recordkeeping requirement for applicants or the Office. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost. Credentialed persons must already comply with a code of ethics; it is not anticipated that additional character and competence requirements will increase or decrease the number of applicants or have an impact on the number of employment opportunities regardless of geographic location. Because these changes are statewide no region will experience any adverse impact because of population density or geography.

3. Costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed because the Office and applicants are involved, not programs. Applicants will pay for their own processing regardless of geographic location.

4. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers in rural areas; therefore, it is designed on its face to minimize adverse impact. Credentialed persons must already comply with a code of ethics; it is not anticipated that additional character and competence requirements will increase or decrease the number of applicants or have an impact on the number of employment opportunities regardless of geographic location. Because these changes are statewide no region will experience any adverse impact because of population density or geography.

5. Rural area participation:

The proposed rule is posted on the agency website; agency review pro-

cess involves input from trade organizations representing providers in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

**Job Impact Statement**

OASAS is not submitting a Job Impact Statement for these amendments because OASAS does not anticipate a substantial adverse impact on jobs and employment opportunities.

The proposed regulation requires persons who apply to the Office for any credential issued by the Office to comply with the requirements of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) and complete a criminal history information review prior to certification, credentialing or hiring. The proposed Rule also requires compliance with a Code of Conduct established by the Justice Center.

The proposed regulation will not have an adverse impact on existing jobs or the development of new employment opportunities for New York residents. It is anticipated that the proposed regulation will not have an adverse impact on existing employees in the field of substance use disorder treatment (certified alcoholism and substance abuse counselors and trainees), substance use disorder prevention counseling (prevention professionals and specialists), or problem gambling counseling. The proposed regulations should not impact the number of criminal history information reviews requested via federal and state existing database. The Office is unable to determine what effect the proposed regulation may have on the employment of independent fingerprinting services or Office employees in the future, but does not anticipate that the proposed rule will increase or decrease the number of applicants for certification.

The proposed regulation does not have an adverse impact on jobs or employment opportunities anywhere in the State; therefore, no region is disproportionately affected by the proposed regulation.

The proposed regulation will have no adverse impact on existing jobs or the development of new employment opportunities.

**Assessment of Public Comment**

The agency received no public comment since publication of the last assessment of public comment.

**EMERGENCY  
RULE MAKING**

**Incident Reporting in OASAS Certified, Licensed, Funded or Operated Programs**

**I.D. No.** ASA-52-14-00007-E

**Filing No.** 1044

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Part 836; addition of new Part 836 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.20, 19.20-a, 19.40, 32.02; Executive Law, section 296(15) and (16); Correction Law, art. 23-A; Civil Service Law, section 50; Protection of People with Special Needs Act, L. 2012, ch. 501

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012 Governor Andrew Cuomo signed the Protection of People with Special Needs Act (PPSNA; chapter 501 of the Laws of 2012); the statute created the Justice Center for the Protection of People with Special Needs (Justice Center) establishing various protections for vulnerable persons, i.e., a new system for incident management in services operated or certified by OASAS; investigation of allegations of abuse and neglect and significant incidents; and new requirements for pre-employment background checks in OASAS certified and operated service providers, persons credentialed by the Office, and applicants for new operating certificates.

The amendments to Part 836, effective June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014 and December 14, 2014 are necessary to implement the incident reporting and management provisions required by the statute and to ensure compliance with the criminal history background check provisions to further enhance patient safety.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals receiving services within the OASAS

treatment system. If OASAS did not promulgate regulations to report and manage incidents of abuse and neglect or other significant incidents, these requirements would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from similar functions performed but differing among the other agencies covered by the Justice Center.

OASAS was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes.

**Subject:** Incident Reporting in OASAS Certified, Licensed, Funded or Operated Programs.

**Purpose:** To enhance protections for service recipients in the OASAS system.

**Substance of emergency rule:** The Proposed Rule would Repeal the current Part 836 and Replace it with a new Part 836. The new Part incorporates amendments related to incident reporting consistent with statutory requirements, definitions and procedures of the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012).

The Proposed Rule also makes technical amendments to standardize formatting for all Office regulations. Amendments related to the Justice Center include:

Section 836.1 sets forth the background and intent and adds language referencing the purpose for establishing the Justice Center and for coordinating agency incident reviews with the Justice Center.

§ 836.2 sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services ("Office"); adds The Protection of People with Special Needs Act; removes repealed statutes; adds the Vulnerable Persons Central Register in § 492 of the social services law.

§ 836.3 amends applicability of this Part to be consistent with Justice Center statute and regulations.

§ 836.4 adds new definitions or amends to be consistent with the Justice Center: "Reportable incident", "physical abuse", "psychological abuse", "deliberate inappropriate use of restraints", "use of aversive conditioning", "obstruction of reports of reportable incidents", "unlawful use or administration of a controlled substance," "neglect", "significant incident", "custodian", "facility or provider agency", "mandated reporter", "human services professional", "physical injury", "delegate investigatory entity", "Justice Center", "Person receiving services," "Personal representative," "Abuse or neglect", "subject of the report," "other persons named in the report," "Vulnerable Persons Central Register," "vulnerable person", "intentionally and recklessly", "clinical records", "Incident management programs", "Incident report", "Missing client", "qualified person", "staff", "Incident review Committee".

§ 836.5 adds requirements for providers of services' policies and procedures related to, and implementation of, an Incident Management Program consistent with the requirements of Chapter 501 of the Laws of 2012.

§ 836.6 adds requirements for incident reporting, notice and investigation to incorporate changes in processes necessitated by Chapter 501 of the Laws of 2012.

§ 836.7 adds requirements for additional notice and reporting requirements for reportable and significant incidents necessitated by Chapter 501 of the Laws of 2012 such as: reporting "immediately" upon discovery of an incident; required reporting to the Justice Center Vulnerable Persons Central Register, Office and regional Field Office; includes all "custodians" as "mandated reporters" for purposes of this regulation.

§ 836.8 adds requirements for configuration of Incident Review Committees consistent with requirements of Chapter 501 of the Laws of 2012.

§ 836.9 adds requirements for recordkeeping and release of records to qualified persons consistent with requirements of Chapter 501 of the Laws of 2012.

§ 836.10 adds to a provider's duty to cooperate regarding inspection of facilities by permitting the Justice Center access for purposes of an investigation of a reportable or significant incident consistent with requirements of Chapter 501 of the Laws of 2012.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Svcs. (OASAS), 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: [Sara.Osborne@oasas.ny.gov](mailto:Sara.Osborne@oasas.ny.gov)

#### Regulatory Impact Statement

##### 1. Statutory Authority:

(a) Protection of People with Special Needs Act, Chapter 501 of the

Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and review criminal history information related to employees or volunteers of treatment facilities certified, licensed, funded or operated by the Office.

(d) Section 19.20-a of the MHL authorizes the Office to receive and review criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Subdivisions (15) and (16) of Section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.

(g) Civil Service Law § 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.

(h) Article 23-A of the Corrections Law provides the factors to be considered concerning a person's previous criminal convictions in making a determination regarding employment and the issuance of a license.

#### 2. Legislative Objectives:

The legislative objectives are the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems.

The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A vulnerable persons' central register contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Persons having committed egregious or repeated acts of abuse or neglect are prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

#### 3. Needs and Benefits:

OASAS is proposing to adopt the following regulation because The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires that allegations of abuse and neglect, and other significant incidents be reported to the Justice Center Vulnerable Persons Central Register via the toll free hotline. This legislation conforms OASAS regulations to definitions, incident reporting, documentation and review requirements of the Justice Center. The legislation strengthens the role of the Incident Review Committee and links compliance with reporting and investigating incidents to a providers operating certificate renewal. Criminal history information reviews will be conducted on each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services ("OASAS" or "Office") who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities and any individual seeking to be credentialed by the Office. The cost of fingerprinting will be subsidized by the Office.

This legislation requires patients and staff be notified of the toll free Vulnerable Persons Central Register for purposes of reporting allegations of abuse and neglect in OASAS certified programs and by OASAS custodians, and that staff receive regular training in their obligations as custodians regarding regulatory requirements for prompt and thorough investigations, staff oversight, confidentiality laws, record keeping, timing of reporting and investigating, content of reports, and procedures for corrective action plan implementation. Training will be provided by the Office or the Justice Center.

The legislation is intended to enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received for individuals seeking employment or volunteering their services and those credentialed by the Office.

The legislation also makes technical amendments to make language and format consistent throughout OASAS regulations.

#### 4. Costs:

The Office anticipates no fiscal impact on providers or local governments, job creation or loss, because the process of reporting incidents will not require any additions or reductions in staffing. OASAS will subsidize the fingerprinting process for not-for-profit providers.

#### 5. Paperwork:

The proposed regulatory amendments will require limited additional information to be reported to the Justice Center by mandated reporters and documentation retained by providers. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

#### 6. Local Government Mandates:

This regulation imposes no new mandates on local governments operating certified OASAS programs.

#### 7. Duplications:

This proposed rule does not duplicate any State or federal statute or rule.

#### 8. Alternatives:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires the adoption of this proposed regulation.

#### 9. Federal Standards:

These amendments do not conflict with federal standards.

#### 10. Compliance Schedule:

The regulations will be effective on June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014 to ensure compliance with Chapter 501 of the Laws of 2012.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the rule:

OASAS services are provided by programs of varying size in every county in New York State; some counties are also certified service providers. The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers of all sizes and on local governments, whether or not they are certified operators; additionally this regulation has been reviewed by the OASAS Advisory Council which consists of providers and stakeholders of all sizes and municipalities.

#### 2. Compliance requirements:

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior. The proposed rule will incorporate the Justice Center incident reporting mechanism and database into the OASAS system so all reporting will be centralized and tracked for patterns and abuse and neglect allegations and other significant incidents. These regulations have been reviewed by the OASAS Advisory council consisting of stakeholders from all regions of the state, providers of all sizes and municipalities.

The Rule sets forth criteria for incident reporting to the Justice Center, investigations, corrective action and penalties for programs and individuals who are not compliant with these, or other applicable, regulations. Incidents will be reported electronically via a toll-free hotline.

#### 3. Professional services:

The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers of all sizes and on local governments, whether or not they are certified operators. OASAS has determined that the new regulations will not require any new staff or any reductions in staff, any new reporting requirements or technology. No additional professional services will be required of as a result of these amendments; nor will the amendments add to the professional service needs of local governments. Because of the electronic nature of the reporting transactions, minimal paperwork will be involved on the part of business or local governments. Because every region of the state has certified programs, and requirements for staffing and training are uniform already, programs will not be affected in any way because of their size or corporate status.

#### 4. Compliance costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed regardless of size or corporate status.

#### 5. Economic and technological feasibility:

Implementation of the rule will require computer and email capability; all providers in all regions of the state, both private and public sector, already have such capability. No upgrades of hardware or software will be required.

#### 6. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers on local governments or small businesses; therefore, it is designed on its face to minimize adverse impact.

#### 7. Small business and local government participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in both public and private sectors, of all sizes and in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration. Providers will be required to retain documentation of fingerprint requests for employees, contractors of volunteers they ultimately employ; this will not be a significant additional recordkeeping requirement for personnel records they are already required to retain. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

### **Rural Area Flexibility Analysis**

1. Rural areas in which the rule will apply (types and estimated number of rural areas):

OASAS services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schoenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of establishing a uniform incident reporting process via a state centralized hotline (Vulnerable Persons Central Register). The proposed regulation incorporates provisions from this Act into the OASAS incident reporting regulation which applies to all programs throughout the state in all geographic locations. Because the regulation applies to incident reporting and incident management in OASAS certified, operated, funded or licensed programs, there is no different application in any geographic location. The proposed regulation incorporates the OASAS incident reporting process into a larger oversight and enforcement entity under the Justice Center. These requirements apply to OASAS providers in all geographic regions. Reporting will be done electronically via telephone or other secure means which are not limited by geography. The new rule does not require any additional staff, although training will be required statewide and be largely provided by the Office or the Justice Center.

The Rule sets forth criteria for incident reporting to the Justice Center, investigations, corrective action and penalties for programs and individuals who are not compliant with these, or other applicable, regulations. The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers in rural areas. Because every region of the state has certified programs, and requirements for staffing, training and incident reporting are uniform already, programs will not be affected in any way because of their geographic location in a rural area.

#### 3. Costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed.

#### 4. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers in rural areas; therefore, it is designed on its face to minimize adverse impact.

#### 5. Rural Area participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

### **Job Impact Statement**

OASAS is not submitting a Job Impact Statement for these amendments because OASAS does not anticipate a substantial adverse impact on jobs and employment opportunities.

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior. The proposed rule incorporates definitions and procedures for reporting incidents to the Justice Center and highlights the role of investigations and a provider Incident Review Committee to be responsible for quality assur-

ance, implementing corrective action plans related to repetitive incidents or patterns of lack of oversight. It also strengthens the link to program certification through the requirement for staff background checks and record retention and the review by OASAS quality assurance staff.

The Rule sets forth criteria for incident reporting to the Justice Center, investigations, corrective action and penalties for programs and individuals who are not compliant with these, or other applicable, regulations. The proposed regulation requires criminal history information reviews of any employee, contractor, or volunteer in treatment facilities certified by the Office who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities.

OASAS has evaluated this proposal considering its impact on existing jobs or the development of new employment opportunities for New York residents. It is anticipated that the proposed regulation will not have an adverse impact on existing employees in the field of substance use disorder treatment, nor affect any reduction or increase in the number of positions available in the future. OASAS providers are already required to report incidents, but the role of a new oversight agency will help to consolidate and streamline that process.

The proposed regulation will have no adverse impact on existing jobs or the development of new employment opportunities because programs are already required to report incidents; new regulations will not require any new staff or any reductions in staff. It is not anticipated that the proposed rule will affect the number of persons applying for employment within the OASAS system.

#### **Assessment of Public Comment**

The agency received no public comment since publication of the last assessment of public comment.

### **NOTICE OF ADOPTION**

#### **Integrated Outpatient Services**

**I.D. No.** ASA-41-14-00018-A

**Filing No.** 1063

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 825 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.07(a) and 32.02

**Subject:** Integrated Outpatient Services.

**Purpose:** To promote access to physical and behavioral health services at a single site and to foster the delivery of integrated services.

**Substance of final rule:** The regulation relates to standards applicable to programs licensed or certified by the Department of Health (DOH; Public Health Law Article 28), Office of Mental Health (OMH; Mental Hygiene Law Articles 31 and 33) or Office of Alcoholism and Substance Abuse Services (OASAS; Mental Hygiene Law Articles 19 and 32) which desire to add to existing programs services provided under the licensure or certification of one or both of the other agencies.

OASAS has made minor, technical changes to the final adopted regulation. The changes to the applicable sections are listed below.

§ 825.1 Background and Intent. This section speaks to the background and intent of the Proposed Rule as applicable to all three agencies (DOH, OMH, and OASAS). The purpose of the Rule is to promote increased access to physical and behavioral health services at a single site and to foster the delivery of integrated services based on recognition that behavioral and physical health are not distinct conditions. One change was made to this section to fix a grammatical error.

§ 825.2 Legal Base. This section provides the Legal Base applicable to all three agencies for the promulgation of this Proposed Rule. Two minor changes were made to this section that were grammatical in nature and serve to provide consistency with DOH's rule.

§ 825.3 Applicability. This section identifies providers of outpatient services or programs to which the standards outlined in the Proposed Rule would apply (e.g., providers certified or licensed, or in the process of pursuing licensure or certification, by at least two of the participating state agencies). Such providers would continue to maintain regulatory standards applicable to the host program's license or certification. Minor changes were made to this section to correct two inaccurate citations and improve readability.

§ 825.4 Definitions. This section provides definitions as used in the Proposed Rule which would be applicable to any program licensed or cer-

tified by any of the three participating state agencies and identified as the host (program requesting the addition of services). Definitions specific to a host program's licensing agency are found in regulations of that agency. Among other things, the section defines an "integrated services provider" as a provider holding multiple operating certificates or licenses to provide outpatient services, who has also been authorized by a Commissioner of a state licensing agency to deliver identified integrated care services at a specific site in accordance with the provisions of this Part. One change was made to the final version to clarify the definition of "primary care services."

§ 825.5 Integrated Care Models. This section describes three (3) models for host programs: (a) Primary Care Host Model with compliance monitoring by DOH; (b) Mental Health Behavioral Care Host Model with compliance monitoring by OMH; and (c) Substance Use Disorder Behavioral Care Host Model with compliance monitoring by OASAS. One change was made to the final version that changes the term "chemical dependence" to "substance use disorder."

§ 825.6 Organization and Administration. This section requires any integrated services provider to be certified by the appropriate state agency and to revise any practices, policies and procedures as necessary to ensure regulatory compliance. One grammatical change was made to this section.

§ 825.7 Treatment Planning. This section requires treatment planning for any patient receiving behavioral health services (OMH and/or OASAS) from an integrated service provider and articulates the scope, standards and documentation requirements for such treatment plans including requirements of managed care plans where applicable. Minor technical changes were made to this section to improve readability.

§ 825.8 Policies and procedures. This section identifies minimum required policies and procedures for any integrated service provider. The term "chemical dependence" was changed to "substance use disorder" in this section.

§ 825.9 Integrated Care Services. This section identifies the minimum services required of any integrated services provider providing any of the three care models. The section also identifies services for each model which may be provided at an integrated services provider's option. One formatting change was made to this section and the terminology was again changed from "chemical dependence" to "substance use."

§ 825.10 Environment. This section outlines minimum physical plant requirements necessary for certifying existing facilities which want to provide integrated care services. The section requires programs seeking certification after the effective date of this Rule or who anticipate new construction or significant renovations to comply with requirements of 10 NYCRR Parts 711 (General Standards of Construction) and 715 (Standards of Construction for Freestanding Ambulatory Care Facilities). An additional Part was added to reference the Approval of Medical Facility Construction, and the term "physical health" was changed to "primary care."

§ 825.11 Quality Assurance, Utilization Review and Incident Reporting. This section outlines the requirements and obligations of an integrated service provider relative to QA/UR and Incident Reporting and are detailed by the type of model as the host program. References to "physical health" have been changed to "primary care" and the term "chemical dependence" has been changed to "substance use disorder."

§ 825.12 Staffing. This section outlines staffing requirements by type of model as the host program and identifies specific requirements which may be unique to the primary care host model such as subspecialty credentials of a medical director. Formatting change was made to improve readability.

§ 825.13 Recordkeeping. This section requires that a record be maintained for every individual admitted to and treated by an integrated services provider. Additional requirements include designated recordkeeping staff, record retention, and minimum content fields specific to each model. Confidentiality of records is assured via patient consents and disclosures compliant with state and federal law.

§ 825.14 Application and Approval. This section outlines the process whereby a provider seeking to become an integrated service provider may submit an application for review and approval. Applications are standardized for use by all three licensing agencies but shall be reviewed by both the agency that regulates the services to be added and the agency with authority for the host clinic. The section identifies minimum standards for approval.

§ 825.15 Inspection. This section requires the state licensing agency with authority to monitor the host clinic to have ongoing inspection responsibility pursuant to standards outlined in this Proposed Rule. The adjunct state licensing agency will not duplicate inspections for license renewal or compliance but shall be consulted about any deficiencies relative to the added services. The section identifies specific areas of review and requires one unannounced inspection prior to renewal of an Operating Certificate or License. Formatting was changed to improve readability.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**Final rule as compared with last published rule:** Nonsubstantive changes were made in the following sections 825.1(b), 825.2(c)(1), (10), 825.3(a), (b), (e), (f), 825.4(j), 825.5(c), 825.6(a), 825.7(a), (c)(1), (2), (e)(8), (f)(4), 825.8(c), 825.9(b)(2), (c)(4), 825.10(a), (c)(2)(i), 825.11(a)(1)(i), (2)(i), (b)(2), 825.12(b)(2)(iv), (v), (vi) and 825.15(d)(2).

**Revised rule making(s) were previously published in the State Register** on October 15, 2014

**Text of rule and any required statements and analyses may be obtained from:** Trisha R. Schell-Guy, Office of Alcoholism and Substance Abuse Services, 1450 Western Avenue, Albany, NY 12203, (518) 485-2312, email: trisha.schell-guy@oasas.ny.gov

#### **Revised Regulatory Impact Statement**

Changes made to the published rule do not necessitate revision to the previously published Regulatory Impact Statement (“RIS”) for the regulatory filing to create a new 14 NYCRR Subpart 825 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the RIS.

#### **Revised Regulatory Flexibility Analysis**

Changes made to the published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis for Small Business and Local Governments (“RFASBLG”) for the regulatory filing to create a new 14 NYCRR Subpart 825 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the RFASBLG.

#### **Revised Rural Area Flexibility Analysis**

Changes made to the published rule do not necessitate revision to the previously published Rural Area Flexibility Analysis for Small Business and Local Governments (“RAFA”) for the regulatory filing to create a new 14 NYCRR 825 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the RAFA.

#### **Revised Job Impact Statement**

Changes made to the published rule do not necessitate revision to the previously published Job Impact Statement (“JIS”) for the regulatory filing to create a new 14 NYCRR Subpart 925 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the JIS.

#### **Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The Office of Alcoholism and Substance Abuse Services (OASAS), Office of Mental Health (OMH) and Department of Health (DOH) received public comments from three provider associations. A fourth set of comments was received from a provider association after the due date. Many of the comments in this late submission were duplicated by other commenters. All comments received were assessed jointly by the three state agencies and are addressed more fully below.

1. Commenters had concerns over not designating a lead agency for the application process and questioning whether a providers wanting to add primary care will need to complete a DOH Certificate of Need (CON) application.

Response: The agencies have developed a web based single application that will be transmitted to all three agencies simultaneously. Providers will be contacted by the involved agencies and may be asked for additional information as necessary. The state licensing agency that originally licensed the site in question will advise the provider of the ultimate determination. There is no separate CON application needed for providers wanting to add primary care.

2. Commenters suggested the regulations are overly restrictive in requiring dual licensure/certification and suggested expanding integrated services to entities that hold only one license/certification, similar to what will be available under Delivery System Reform Incentive Payment (DSRIP) program.

Response: These regulations represent only one model of integrated care, which allows providers who are already licensed or certified by more than one agency to add services at one of their sites without needing to obtain a second license or certification. This allows the agencies to expedite approval and streamline oversight at the site where additional services are added. There are other models of integrated care available to providers, including proceeding under the current allowable thresholds or, for those providers participating in DSRIP, requesting regulatory waivers.

3. A commenter requested that integrated providers, particularly federally qualified health centers (FQHCs), be permitted to be reimbursed for multiple threshold visits per day.

Response: These regulations do not effectuate any change for reimbursement of outpatient services. Integrated providers, including FQHCs that have opted into APGs, can bill using the APG Medicaid reimbursement methodology which permits billing of multiple procedures within a single visit. Generally, integrated providers, including FQHCs are encouraged to bill using the APG reimbursement methodology which enables providers to bill for all the procedures/services rendered on a date of service on a single claim. The Department will undertake consideration of additional mechanisms for billing by FQHCs that do not utilize APGs.

4. A commenter recommended eliminating the requirement for physical separation of space between types of service providers.

Response: Under the regulations (14 NYCRR 825.10(c)(1)(i), 14 NYCRR 599-1.10(c)(1)(i) and 10 NYCRR 404.10(c)(1)(i)), examination rooms must be generally available during the hours when primary care services are offered. Such rooms can be used for behavioral health services if not being used for primary care services at that time and if appropriate for the services.

5. A commenter asked whether the boards of integrated providers must include all clinical areas of expertise which they provide.

Response: This is not specifically required by the regulations; however, providers will need to ensure that they are capable of carrying out the requirements that “the established governing bodies of licensed integrated service shall be legally responsible for quality of care and compliance with all applicable laws and regulations.” 14 NYCRR 825.6(b), 14 NYCRR 599-1.6(b) and 10 NYCRR 404.6(b).

6. A commenter requested clarification of the requirement that treatment plans identify each diagnosis for which a patient is being treated.

Response: Treatment plans may be integrated. To the extent they are, all diagnoses for which a patient is being treated should be included in the plan. The agencies are developing a guidance document which will provide additional instructions in treatment plan development.

7. A commenter noted that while the proposed regulations require that periodic reviews of treatment plans include “an evaluation of physical health status” the reviews also should include adjustments to address physical health needs.

Response: 14 NYCRR 825.7(g)(3), 14 NYCRR 599-1.7(g)(3) and 10 NYCRR 404.7(g)(3) apply to treatment plan reviews. By definition a review would include any necessary adjustments to the plan including those required to address shifting physical health needs. No change will be made.

8. Commenters requested clarification of how many professionals are required to sign a treatment plan under 14 NYCRR 825.7(g)(4), 14 NYCRR 599-1.7(g)(4) and 10 NYCRR 404.7(g)(4). Requiring multiple professionals to sign a treatment plan would be burdensome.

Response: Only one responsible staff member involved in the patient’s care needs to sign the treatment plan. The regulations have been clarified.

9. Commenters asked why primary care excludes OB/GYN services.

Response: The regulations (14 NYCRR 825.9(a)(2)(iv), 14 NYCRR 599-1.9(a)(2)(v) and 10 NYCRR 404.9(a)(2)(v)) provide that for behavioral health care models primary care services provided within the specialty of OB/GYN are limited to routine gynecologic care and family planning provided pursuant to 10 NYCRR Part 753. Other OB/GYN services are considered specialty care beyond the scope of what should be offered in these settings.

10. A commenter asked why there are different criteria for how a provider will be determined to be “in good standing” based on the licensing agency.

Response: The regulations set forth a process for expediting approval of the addition of services at a site in lieu of licensure or certification by a second agency; therefore, the provider needs to be in good standing according to the standards of each agency by which it is licensed or certified. All providers will be evaluated using the same criteria after they have been approved to deliver integrated services.

11. A commenter asked why the regulations require integrated providers to be members of a Health Home if being a member of a DSRIP performing provider system (PPS) would be sufficient.

Response: The enabling legislation derives from Health Home legislation and therefore Health Home affiliation is required. The objective of the integrated services initiative are consistent with the objective of the health homes program. Membership in a DSRIP PPS alone is not sufficient.

12. A commenter asked if unannounced inspections occur prior to approval for joint licensure or only prior to renewal?

Response: The inspections contemplated by 14 NYCRR 825.15, 14 NYCRR 599-1.15 and 10 NYCRR 404.15 will occur after approval.

13. A commenter raised a concern about the ability of “busy clinical staff” to meet with agency inspectors and provide requested clinical records.

Response: A key benefit to the integrated licensure regulations is that clinics providing services of multiple State agencies will only be subject

to an inspection by one (“host”) State agency, rather than an inspection by each agency. The agencies are mindful of staff time and resources; however to ensure compliance and continued authorization for delivery of integrated services routine inspections are necessary.

14. A commenter asked if fiscal viability reviews will be based on the viability of the integrated services or the entire organization and asked if this requirement could be eliminated.

Response: The requirement is necessary to examine how the operation of an integrated services program will impact the overall fiscal integrity of the provider.

15. A commenter stated that there is duplication and inconsistency between the integrated services regulation and existing regulations for clinics or diagnostic and treatment centers and recommended that 14 NYCRR 825.3(c), 14 NYCRR 599-1.3(c) and 10 NYCRR 404.3(c) be eliminated.

Response: These sections cannot be eliminated because they provide the basis for integrated service providers operating pursuant to the standards of the state agency that initially licensed or certified the provider at the site at which services will be added. The guidance document will provide clarification to the extent any specific inconsistencies are identified.

16. A commenter requested that the definition of primary care services be changed to include “any qualified practitioner working within their defined scope of practice.” Another commenter recommended that the definition of primary care services be expanded to include other professionals.

Response: The regulations were designed to allow providers to add primary care services in certain settings where behavioral health care services are offered. The requested clarification could allow the inclusion of specialty care, which is not appropriate for these settings.

17. Commenters expressed concern that the regulations would restrict providers who do not apply to become an integrated services provider from marketing themselves as delivering integrated services.

Response: These regulations are intended to facilitate one model of delivering integrated care. There is no prohibition on other models that exist or may exist so long as otherwise allowable. 14 NYCRR 825.6(a), 14 NYCRR 599-1.6(a) and 10 NYCRR 404.6(a) have been clarified to reflect this by removing the word “only.”

18. Commenters expressed concerns about the potential conflict between the treatment planning requirements in the regulation and those of Medicaid managed care companies.

Response: The regulations were designed to allow providers to comply with the requirements of Medicaid managed care plans, therefore 14 NYCRR 825.7(c)(2), 14 NYCRR 599-1.7(c)(2) and 10 NYCRR 404.7(c)(2) were clarified by adding “notwithstanding this section.”

19. A commenter asked if the treatment planning section of the regulations replace the treatment planning section in Part 822 or 599.

Response: Providers licensed by OMH or certified by OASAS still need to follow 14 NYCRR Parts 599 and 822, respectively. The treatment planning section in these regulations applies to the extent that integrated services are offered. The agencies are developing a guidance document that will provide additional instruction in treatment plan development.

20. A commenter stated that the treatment planning requirements of “factors” to be considered (14 NYCRR 825.7(e), 14 NYCRR 599-1.7(e) and 10 NYCRR 404.7(e)) are too prescriptive and should be made more flexible.

Response: The factors identified are critical to ensuring a patient’s behavioral health needs are appropriately assessed and identified and that an acceptable plan of care is developed. These are the minimum factors to be considered and providers may choose to expand on them.

21. A commenter recommended that the language related to discharge planning be eliminated because many patients will never be discharged and always require continuing care.

Response: Planning for “discharge” from behavioral health treatment is a critical part of the treatment planning process. The agencies are developing a guidance document that will provide additional instruction on continuing care and discharge planning.

22. A commenter stated that problem areas in a treatment plan should not be limited to patient-identified problem areas but should also include provider-identified problem areas.

Response: These are the minimum areas to be considered and providers may choose to expand on them and include provider-identified areas.

23. A commenter recommended that list of identified psychotherapy services identified in 14 NYCRR 825.9, 14 NYCRR 599-1.8 and 10 NYCRR 404.9 should permit the use of telemedicine.

Response: These regulations do not prohibit the use of telemedicine to the extent otherwise permitted.

24. Commenters raised concerns over limiting substance use disorder counseling to two distinct methods, individual and group, both of which require face-to face delivery.

Response: 14 NYCRR 828.9(c)(3), 14 NYCRR 599-1.9(c)(3) and 10

NYCRR 404.9(c)(3) state “Integrated services providers of substance use disorder services shall offer, at a minimum, each of the following services...” The regulations do not prohibit the use of telemedicine to the extent otherwise permitted.

25. Commenters raised concerns over the creation of additional, expensive and/or redundant environmental/physical plant standards and the dichotomy in the standards between providers currently licensed and those licensed after the effective date of the regulations.

Response: The regulations provide additional flexibility to accommodate existing space for providers adding primary care services. Providers with three or fewer examination rooms need to follow only the environmental/physical plant standards as set forth in the new regulations. Prospective providers that have never obtained a license or certification from any of the three agencies prior to the effective date of the new regulations and therefore are not using any licensed or certified space will be required to follow existing Article 28 standards in the provision of primary care.

26. A commenter stated that the creation of additional burdens based on whether there are 3 or less examination rooms creates a potential barrier to behavioral health providers that want to add primary care.

Response: The additional requirements are necessary in settings with over 3 examination rooms to ensure patient health and safety in light of the higher volume of primary care visits.

27. A commenter suggested that the state adopt the 2010 edition of NFPA 101 Life Safety Code instead of referencing the outdated 2000 edition.

Response: The regulations rely on the most recently adopted version of the Life Safety Code but includes categorical waivers that have been issued by CMS based on the 2012 Life Safety Code to provide a standard that is consistent with NFPA current updates.

28. A commenter stated that the quality assurance requirements for providers of primary care should not be in addition to those already required of primary care providers under 10 NYCRR 405.6.

Response: The quality assurance requirements contained in 14 NYCRR 825.11(a)(1), 14 NYCRR 599-1.11(a)(1) and 10 NYCRR 404(a)(1) apply only to those providers adding primary care. They are not additional requirements for Article 28 providers adding behavioral health services.

29. A commenter stated that the regulations have criteria for medical directors where primary care and substance use disorder services are provided but inquired as to whether integrated service providers adding mental health are required to have a medical director. If so, there should be discretion as to whether this is a full-time or part-time medical director.

Response: The regulations require providers adding primary care or substance use disorder services to utilize a medical director. Providers adding mental health services do not have a similar requirement; however, such providers will already have a medical director in place due to their existing licensure or certification by DOH or OASAS.

30. A commenter stated that the development of integrated care records is essential and recommended that the regulations be amended to state that patient consent to integrated care constitutes compliance with state and federal disclosure requirements.

Response: The regulations reflect the importance of integrated patient records. The regulations do not prohibit the use of patient consent for purpose of providing integrated care. The agencies are developing a guidance document which will provide additional instruction on recordkeeping and consent issues.

31. A commenter seeks clarification on whether the authority to provide integrated services extends system-wide or is site-specific.

Response: The approval is site specific; however providers can have multiple sites approved. There is no limit on the number of sites for which a provider can seek approval.

32. A commenter asked about how the new deeming law authorizing OMH and OASAS to accept hospital accreditation from a national organization in lieu of separate, duplicate state surveys will interact with the survey process for integrated service providers.

Response: The new deeming law has not been operationalized in ambulatory behavioral health settings yet. OMH and OASAS have started to work on a plan to allow deeming in these settings. This plan will address integrated service providers.

33. Commenters raised concerns over billing and rates not being addressed in the regulation and the need to have one billing process to streamline the system.

Response: The agencies will provide Medicaid billing and claiming guidance which addresses the complexities in each service category. Generally, providers will be encouraged to submit a single APG claim for each visit (including those comprising multiple service types) with all the procedures/services rendered on that date of service using the host’s assigned Integrated Services rate codes. Medicaid managed care plans will be notified of the Department of Health’s Medicaid billing/reimbursement policies as they relate to the types integrated services rendered by rendering providers.

34. A commenter stated that CASAC was eliminated from the qualified health professional list in outpatient mental health clinics and recommended that CASACs should be part of the joint license for billing purposes.

Response: Currently CASAC's are not considered qualified health professionals in OMH and DOH clinics. CASACs can be used for delivery of substance use disorder services in any approved integrated setting that has authority from OASAS to deliver substance use disorder services, provided that all other applicable staffing requirements are met.

35. A commenter recommended adding language to the policies and procedures section about using electronic medical records and sharing information.

Response: The regulations do not prohibit electronic medical records and information sharing. The manner of recordkeeping is left up to the provider.

36. A commenter asked why group counseling for substance use disorder treatment is limited to 15 people when there is no such limit for other disciplines.

Response: These requirements are consistent with current OASAS requirements and best practices in substance use disorder treatment.

37. A commenter requested clarification of "staff and appropriate equipment" needed to deliver primary care services.

Response: Provider must ensure that they have the staff and equipment necessary to provide services that are consistent with prevailing standards of care.

38. A commenter asked what the periodic reviews of primary care services with behavioral health services entail in the context of a quality assurance program.

Response: Periodic reviews are required as part of a provider's quality assurance program, which must be designed to verify that providers have processes in place for the provision of quality and appropriate care.

39. A commenter recommended that the quality assurance, utilization review and incident reporting sections be consolidated into a single set as they are overly burdensome and do not foster true integration.

Response: These sections were designed to promote flexibility for participating providers.

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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

#### Protection of Vulnerable Persons

**I.D. No.** CFS-52-14-00011-E

**Filing No.** 1047

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Subpart 166-1 and Parts 180 and 182 of Title 9 NYCRR; and amendment of Parts 402, 414, 416, 417, 418, 421, 433, 435, 441, 442, 443, 447, 448, 449, 476, 477 and 489 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d) and 34(3)(f); Executive Law, sections 501(5) and 532-e; and L. 2012, ch. 501

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** Chapter 501 of the Laws of 2012 established the Justice Center for the Protection of People with Special Needs ("Justice Center"). The Justice Center is tasked with overseeing and improving consistency in responses to incidents of abuse and neglect of vulnerable people. The Justice Center has also been tasked with establishing standards for tracking and investigating complaints and enforcement against those who commit substantiated acts of abuse and neglect. The legislation requires the Office of Children and Family Services, as a state oversight agency of vulnerable persons, to develop standards consistent with the Justice Center. These standards are to protect vulnerable people against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, and to provide fair treatment and notice to the employees. The Office of Children and Family Services

must promulgate regulations to provide notice, guidance and standards to all facilities, provider agencies and employees who are affected by the legislation. The Justice Center took effect June 30, 2013.

Facilities and provider agencies covered by the legislation include voluntary agencies that operate residential programs that are licensed or certified by the Office of Children and Family Services, residential runaway and homeless youth programs, family type homes for adults, certified detention programs, OCFS operated juvenile justice programs, and any local department of social services that runs a detention program or has a contract with an authorized agency for detention services or has a contract(s) for care of foster children in out of state facilities.

Effective on June 30, 2013 reports of suspected child abuse or neglect in a residential program no longer fall under the jurisdiction of the Statewide Central Register of Child Abuse and Maltreatment (SCR). Any concerns regarding abuse or neglect of a child in a residential care program must be reported to the Vulnerable Persons Central Register (VPCR). The VPCR will also register reports of suspected abuse or neglect of persons residing in Family Type Homes for Adults (FTHA). Reports registered by the VPCR will be forwarded to Justice Center investigative staff or to investigative staff at the State Agency that licenses, certifies or operates the facility or provider agency. Regulations are required to provide direction to facilities, provider agencies, employees, local government staff and the public. It is imperative that rules be in place for the proper implementation of the Justice Center legislation.

In addition, these emergency regulations re-insert language at section 182-1.5 of Title 9 NYCRR to prohibit discrimination on the basis of sexual orientation, gender identity or expression. This language had been part of the regulations until June 2014 when they were inadvertently overwritten by other regulatory changes. This language is necessary to provide protection from such discrimination for the persons receiving services in the programs regulated by section 182-1.5 of Title 9 NYCRR.

Promulgating emergency regulations will ensure compliance with legislative requirements and provide the necessary guidance to affected persons. Absent the filing of emergency regulations, guidance, protections and processes will not be available to the aforementioned listed facilities and agencies.

**Subject:** Protection of Vulnerable Persons.

**Purpose:** Create a durable set of consistent safeguards for vulnerable persons that protect them against abuse, neglect and other conduct.

**Substance of emergency rule:** Chapter 501 of the Laws of 2012 established the Justice Center for the Protection of People with Special Needs ("Justice Center"). The legislation requires the Office of Children and Family Services ("OCFS") to promulgate regulations consistent with the Justice Center oversight, regulations and enforcement. These regulations enact changes in line with the legislation to protect vulnerable people against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, and to provide fair treatment and notice to the employees. The included additions and amendments allow OCFS to comply with the statutory requirements that became effective June 30, 2013.

The facilities and provider agencies that are license, operated or certified by OCFS that are affected are the following: residential runaway and homeless youth programs; family type homes for adults; certified detention programs; OCFS operated juvenile justice programs; voluntary agency run institutions, group residences, group homes, agency operated boarding homes including supervised independent living programs; and, any local department of social services that runs a detention program or has a contract with an authorized agency for detention services or has a contract(s) for care of foster children in out-of-state facilities. In addition, additional background check requirements were added for Family Foster Boarding Homes, families applying to adopt a child and child care providers. Regulations were added or amended to incorporate reporting, investigative, recordkeeping, record production, administrative, and personnel requirements, among others.

The first category of regulations added or amended address jurisdiction of the newly created Vulnerable Persons Central Register (VPCR). Regulations will now reflect that reports of suspected abuse or neglect of persons receiving services in OCFS licensed, certified or operated residential care programs will be reported to the VPCR. Additionally reports regarding significant incidents that harm or put a service recipient at risk of harm at those same programs will be reported to the VPCR.

The second category of regulations added or amended addresses requirements of mandated reporters and what mandated reporters will be required to report to the VPCR. Acts of abuse/neglect and significant incidents are defined and procedures regarding making a report to the VPCR are outlined.

The third category of regulations added or amended provides for the requirement of data collection by the facility or provider agencies in response to requests by the Justice Center and standards for release of that information by the Justice Center.

The fourth category of regulations added or amended provides for the creation of incident review committees to affected facilities and provider agencies.

The fifth category of regulations added or amended provides criminal history background checks and checks of the Justice Center's list of substantiated category one reports of abuse and neglect prior to hiring certain employees, use of volunteers or contracts with certain entities have been added or amended.

Lastly, language inadvertently overwritten in June 2014 was re-inserted at section 182-1.5 of Title 9 NYCRR. The re-inserted language prohibits discrimination on the basis of sexual orientation, gender identity or expression. Inclusion of this language provides protection from such discrimination for the persons receiving services in the regulated programs.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 15, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, NY 12144, (518) 473-7793

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its powers and duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State.

Section 501(5) and 532-e of the New York State Executive Law authorizes the Commissioner of OCFS to promulgate rules and regulations for the establishment, operation and maintenance of division facilities and programs.

Section 490 of the SSL as found in Chapter 501 of the Laws of 2012 requires the Commissioner of OCFS to promulgate regulations that contain procedures and requirements consistent with guidelines and standards developed by the justice center and addressing incident management programs required by the Chapter Law.

##### 2. Legislative objectives:

The proposed changes to the regulations concerning vulnerable persons in programs licensed, certified or operated by OCFS are necessary to further the legislative objective that vulnerable persons be safe and afforded appropriate care.

##### 3. Needs and benefits:

To the extent a change to the run away and homeless youth regulations is a technical change, the need is to reauthorize language already found in regulation and implemented by program.

The proposed changes to the regulations concerning vulnerable persons in programs licensed, certified or operated by OCFS providers is in response to the recognized need to strengthen and standardize the safety net for vulnerable persons, adults and children alike, who are receiving care from New York's human service agencies and programs. The Protection of People with Special Needs Act creates a set of uniform safeguards, to be implemented by a justice center whose primary focus will be on the protection of vulnerable persons. Accordingly, the benefit of this legislation is to create a durable set of consistent safeguards for all vulnerable persons that will protect them against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, and to provide fair treatment to the employees upon whom they depend.

##### 4. Costs:

The proposed regulatory changes are not expected to have an adverse fiscal impact on authorized agencies, family type homes for adults, or on the social services districts with regard to reporting and recordkeeping requirements. Current laws and regulations impose similar levels of reporting and recordkeeping. In conforming to and complying with the new statutory and regulatory requirements authorized agencies and other facilities will necessarily have to reconfigure current utilization of staff and duties. The enhancement of services for the protections of Vulnerable Persons will incur additional costs.

To the extent a change to the run away and homeless youth regulations is a technical change, there is no anticipated cost.

##### 5. Local government mandates:

The proposed regulations will not impose any additional mandates on social services districts. Local Districts have been provided with an amended model contract for use in securing out of state residential services for children in foster care. This model contract replaced a model contract already in existence and used by Local Districts.

To the extent a change to the run away and homeless youth regulations is a technical change, there are no additional mandates.

##### 6. Paperwork:

The proposed regulations do not require any additional paperwork. Requirements regarding documentation are currently in regulation. These regulations will require sharing such documentation with the Justice Center.

##### 7. Duplication:

The proposed regulations do not duplicate any other State or Federal requirements.

##### 8. Alternatives:

These regulations are required to comply with Chapter 501 of the Laws of 2012 and add a technical change to 9 NYCRR 182-1.5.

##### 9. Federal standards:

The regulatory amendments do not conflict with any federal standards.

##### 10. Compliance schedule:

The regulations will be effective on September 17, 2014 to ensure compliance with Chapter 501 of the Laws of 2012.

#### **Regulatory Flexibility Analysis**

1. Types and estimated number of small businesses and local governments:

Social services districts and voluntary authorized agencies contracting with such social services districts to provide residential foster care services to children, authorized agencies providing juvenile detention services, runaway and homeless youth shelters and adult family type homes will be affected by the proposed regulations, as well as state operated juvenile justice facilities.

2. Reporting, recordkeeping and compliance requirements and professional services:

Prior to Chapter 501 of the Laws of 2012, authorized agencies, facilities and mandated reporters employed by the same were required reporters of suspected child abuse or maltreatment to the New York Statewide Central Register of Child Abuse and Maltreatment. Pursuant to the statutory requirements of Social Services Law Sections 490 and 491, those mandated reporters are now required to report all reportable incidents, which will include but not be limited to those things previously falling within the definitions of abuse and neglect of a child in residential care, to the Vulnerable Persons Central Register. Authorized Agencies and facilities will be required to maintain the same level of practice as it relates to recordkeeping, and prevention and remediation plans. Authorized agencies and facilities will be required to comply with investigations and information requests as required by the Justice Center for the Protection of People with Special Needs, as defined in Article 20 of the Executive Law.

The proposed regulations and amendments alter practice to conform to statutory obligations set forth in Chapter 501 of the Laws of 2012.

##### 3. Costs:

To the extent a change to the run away and homeless youth regulations is a technical change, there is no anticipated cost. All affected programs such as authorized agencies or facilities are currently subject to requirements governing reporting, recordkeeping, management of approved procedures and policies. As such the proposed regulations should not impose any additional costs associated with those functions. The statutory and regulatory requirements will necessarily require a reconfiguration of the current utilization of administrative costs to conform and comply with the requirements of the new law and conforming regulations. The statutory scheme provides for the enhancement of services for the protections of Vulnerable Persons, which will have added costs.

##### 4. Economic and technological feasibility:

The proposed regulatory changes would not require any additional technology and should not have any adverse economic consequences for regulated parties.

##### 5. Minimizing adverse impact:

The proposed changes to the regulations will require authorized agencies and facilities to conform to new reporting and recordkeeping requirements, however inconsistent and duplicative measures have been addressed by the regulations to minimize the impact. Trainings will be taking place across systems, as well as the dissemination of guidance documentation in advance of the effective date of the regulations.

##### 6. Small business and local government participation:

Potential changes to the regulations governing the protection of people with special needs will be thoroughly addressed through statewide trainings and guidance documentation distributed to local representatives of social services, authorized agencies and facilities.

#### **Rural Area Flexibility Analysis**

##### 1. Types and estimated number of rural areas:

Social services districts in rural areas and voluntary authorized agencies contracting with such social services districts to provide residential foster care services to children, authorized agencies providing juvenile detention services, runaway and homeless youth shelters and adult family type homes will be affected by the proposed regulations, as well as state operated juvenile justice facilities.

2. Reporting, recordkeeping and compliance requirements and professional services:

Prior to Chapter 501 of the Laws of 2012, authorized agencies, facilities and mandated reporters employed by the same were required reporters of suspected child abuse or maltreatment to the New York Statewide Central Register of Child Abuse and Maltreatment. Pursuant to the statutory requirements of Social Services Law Sections 490 and 491, those mandated reporters are now required to report all reportable incidents, which will include but not be limited to those things previously falling within the definitions of abuse and neglect of a child in residential care, to the Vulnerable Persons Central Register. Authorized Agencies and facilities will be required to maintain the same level of practice as it relates to recordkeeping, and prevention and remediation plans. Authorized agencies and facilities will be required to comply with investigations and information requests as required by the Justice Center for the Protection of People with Special Needs, as defined in Article 20 of the Executive Law.

The proposed regulations and amendments alter practice to conform to statutory obligations set forth in Chapter 501 of the Laws of 2012.

### 3. Costs:

To the extent a change to the run away and homeless youth regulations is a technical change, there is no anticipated cost. An authorized agency or facility is currently subject to requirements governing reporting, recordkeeping, management of approved procedures and policies, so the proposed regulations should not impose any additional costs associated with those functions. The statutory and regulatory requirements will necessarily require a reconfiguration of the current utilization of administrative costs to conform and comply with the requirements of the new law and conforming regulations. The statutory scheme provides for the enhancement of services for the protections of Vulnerable Persons, which will have added costs.

### 4. Minimizing adverse impact:

The proposed changes to the regulations require authorized agencies and facilities approved, licensed, certified or operated by the Office of Children and Family Services to protect Vulnerable Persons as defined by Social Services Law Section 488. The regulations are in direct response to the need to strengthen and standardize the protection of vulnerable people in residential care. The Protection of People with Special Needs Act creates uniform standards across systems to be implemented and monitored by the Justice Center.

### 5. Rural area participation:

Potential changes to the regulations governing implementation of the statute regarding the protection of people with special needs will be addressed through trainings and guidance documentation distributed to representatives of social services districts, authorized agencies, including those that serve rural communities.

### Job Impact Statement

The proposed regulations are not expected to have a negative impact on jobs or employment opportunities in either public or private sector service providers. A full job statement has not been prepared for the proposed regulations as it is not anticipated that the proposed regulations will have any adverse impact on jobs or employment opportunities.

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## Department of Civil Service

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### NOTICE OF ADOPTION

#### Supplemental Military Leave Benefits

**I.D. No.** CVS-14-14-00001-A

**Filing No.** 1022

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 21.15 and 28-1.17 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Supplemental military leave benefits.

**Purpose:** To extend the availability of supplemental military leave benefits for certain New York State employees until December 31, 2014.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00001-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-14-14-00021-A

**Filing No.** 1023

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00021-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-14-14-00022-A

**Filing No.** 1021

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00022-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-14-14-00023-A

**Filing No.** 1026

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00023-P.

**Final rule as compared with last published rule:** No changes.

*Text of rule and any required statements and analyses may be obtained from:* Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-14-14-00024-A

**Filing No.** 1024

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 1 and Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the exempt class and non-competitive class.

**Text of final rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of Employee Relations," by decreasing the number of positions of Assistant Director from 9 to 8, Confidential Assistant from 5 to 2, Confidential Stenographer from 10 to 7, Employee Program Assistant from 5 to 3 and Employee Program Associate from 8 to 4; in the Labor Management Committees, by decreasing the number of positions of Employee Program Assistant from 28 to 27 and Employee Program Associate from 24 to 23; in the Department of State under the subheading "Joint Commission on Public Ethics," by decreasing the number of positions of Information Technology Specialist (JCOPE) from 4 to 1 and by deleting therefrom the position of Manager Information Services; and, in the Executive Department under the subheading "Office of Information Technology Services," by adding thereto the positions of Assistant Director, Confidential Assistant (2), Confidential Stenographer (2), and Information Technology Specialist (JCOPE) (3) and by increasing the number of positions of Employee Program Assistant from 1 to 4, Employee Program Associate from 1 to 6 and Manager Information Services from 1 to 2; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor under the subheading "Workers' Compensation Board," by deleting therefrom the position of Assistant Director Information Technology Services 1 (1); and, in the Executive Department under the subheading "Office of Information Technology Services," by adding thereto the position of Assistant Director Information Technology Services 1 (1).

**Final rule as compared with last published rule:** Nonsubstantive changes were made in Appendix 1.

*Text of rule and any required statements and analyses may be obtained from:* Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Revised Regulatory Impact Statement, Revised Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA, and JIS.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-14-14-00025-A

**Filing No.** 1020

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and classify a position in the non-competitive class.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00025-P.

**Final rule as compared with last published rule:** No changes.

*Text of rule and any required statements and analyses may be obtained from:* Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-14-14-00026-A

**Filing No.** 1025

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00026-P.

**Final rule as compared with last published rule:** No changes.

*Text of rule and any required statements and analyses may be obtained from:* Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-14-14-00027-A

**Filing No.** 1019

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text or summary was published** in the April 9, 2014 issue of the Register, I.D. No. CVS-14-14-00027-P.

**Final rule as compared with last published rule:** No changes.

*Text of rule and any required statements and analyses may be obtained from:* Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-20-14-00002-A  
**Filing No.** 1030  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text or summary was published** in the May 21, 2014 issue of the Register, I.D. No. CVS-20-14-00002-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-20-14-00004-A  
**Filing No.** 1028  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text or summary was published** in the May 21, 2014 issue of the Register, I.D. No. CVS-20-14-00004-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-20-14-00005-A  
**Filing No.** 1029  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text or summary was published** in the May 21, 2014 issue of the Register, I.D. No. CVS-20-14-00005-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-20-14-00006-A  
**Filing No.** 1018  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class.

**Text or summary was published** in the May 21, 2014 issue of the Register, I.D. No. CVS-20-14-00006-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-20-14-00007-A  
**Filing No.** 1027  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the exempt class.

**Text or summary was published** in the May 21, 2014 issue of the Register, I.D. No. CVS-20-14-00007-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-25-14-00001-A  
**Filing No.** 1033  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text or summary was published** in the June 25, 2014 issue of the Register, I.D. No. CVS-25-14-00001-P.

**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**  
**I.D. No.** CVS-25-14-00002-A  
**Filing No.** 1031  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To classify a position in the exempt class.  
**Text or summary was published** in the June 25, 2014 issue of the Register, I.D. No. CVS-25-14-00002-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**  
**I.D. No.** CVS-25-14-00004-A  
**Filing No.** 1034  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To delete a position from and classify a position in the exempt class.  
**Text or summary was published** in the June 25, 2014 issue of the Register, I.D. No. CVS-25-14-00004-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**  
**I.D. No.** CVS-25-14-00005-A  
**Filing No.** 1036  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.  
**Purpose:** To delete a position from and classify a position in the exempt class.  
**Text or summary was published** in the June 25, 2014 issue of the Register, I.D. No. CVS-25-14-00005-P.

**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**  
**I.D. No.** CVS-25-14-00006-A  
**Filing No.** 1035  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To classify a position in the non-competitive class.  
**Text or summary was published** in the June 25, 2014 issue of the Register, I.D. No. CVS-25-14-00006-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**  
**I.D. No.** CVS-25-14-00008-A  
**Filing No.** 1032  
**Filing Date:** 2014-12-12  
**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To delete positions from and classify a position in the non-competitive class.  
**Text or summary was published** in the June 25, 2014 issue of the Register, I.D. No. CVS-25-14-00008-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov  
**Assessment of Public Comment**  
 The agency received no public comment.

## Education Department

### EMERGENCY RULE MAKING

#### Academic Intervention Services (AIS)

**I.D. No.** EDU-39-14-00015-E

**Filing No.** 1039

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 100.2(ee) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** The proposed rule would extend certain of the provisions in section 100.2(ee) of the Commissioner's Regulations through the 2014-2015 school year, in order to provide continued flexibility to school districts in the provision of Academic Intervention Services (AIS) for those students who performed below Level 3 on the grade 3-8 ELA and math assessments but at or above cut scores established by the Regents.

The proposed amendment was adopted as an emergency action at the September 15-16, 2014 Regents meeting, effective September 16, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on October 1, 2014. Since the Board of Regents meets at monthly intervals, the earliest the proposed amendment could be adopted by regular action after publication of the Notice of Proposed Rule Making and expiration of the 45-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202 would be the December 15-16, 2014 Regents meeting. Because SAPA section 203(1) provides that an adopted rule may not become effective until a Notice of Adoption is published in the State Register, the earliest the proposed amendment could become effective if adopted at the December Regents meeting, is December 31, 2014. However, the September emergency rule will expire on December 14, 2014, 90 days from its filing with the Department of State on September 16, 2014. A lapse in the rule's effective date could disrupt the provision of modified AIS services during the 2014-2015 school year.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the September 2014 Regents meeting remains continuously in effect until the effective date of its permanent adoption.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 15-16, 2014 Regents meeting, which is the first scheduled Regents meeting after publication of the proposed rule in the State Register and expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

**Subject:** Academic Intervention Services (AIS).

**Purpose:** To establish modified requirements for AIS during the 2014-2015 school year.

**Text of emergency rule:** Paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 15, 2014, as follows:

(2) Requirements for providing academic intervention services in grade three to grade eight. Schools shall provide academic intervention services when students:

(i) score below:

(a) the State designated performance level on one or more of the State elementary assessments in English language arts, mathematics or science, provided that for the [2013-2014] 2014-2015 school year only, the following shall apply:

(1) those students scoring below a scale score specified in subclause (3) of this clause shall receive academic intervention instructional services; and

(2) those students scoring at or above a scale score specified in subclause (3) of this clause but below level 3/proficient shall not be required to receive academic intervention instructional and/or student sup-

port services unless the school district, in its discretion, deems it necessary. Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the [2013-2014] 2014-2015 school year to students who scored above a scale score specified in subclause (3) of this clause but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in [2012-2013] 2013-2014, and shall no later than [November 1, 2013] November 1, 2014 either post to its website or distribute to parents in writing a description of such process??

(3) . . .

(b) . . .

(ii) . . .

(iii) . . .

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-39-14-00015-EP, Issue of October 1, 2014. The emergency rule will expire February 12, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Board of Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education.

Education law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of education.

Education Law section 3204(3) provides for the courses of study in the public schools.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to academic intervention services (AIS).

##### 3. NEEDS AND BENEFITS:

In 2013, the Regents adopted amendments to Commissioner's Regulations section 100.2(ee) [EDU-40-13-00005-EP, State Register October 2, 2014; EDU-40-13-00005-A, State Register December 31, 2013] that provided flexibility to districts in the provision of Academic Intervention Services (AIS) for the 2013-2014 school year, in recognition of the fact that the State assessments administered to New York students in Spring 2013 were the first that measured the progress of students in meeting the expectations of the Common Core Learning Standards (CCLS). The proposed amendment would extend similar flexibility in the provision of AIS for the 2014-2015 school year.

At the Board of Regents July 2013 meeting, Department staff discussed with the Board the implications for the provision by school districts of AIS as a result of the substantial decrease in the percentage of students who demonstrated the knowledge and skills necessary to meet grade level Common Core Learning Standards (CCLS) relative to the percentage of students demonstrating this against the 2005 standards.

To ensure that existing support services, including Academic Intervention Services (AIS), remain relevant and appropriate as New York implements the CCLS, the Regents directed the Department to develop proposed amendments to Commissioner's Regulations to provide flexibility in the provision of AIS.

Historically, students who have scored below proficient (Level 3) on State assessments in English language arts or mathematics have been required to receive AIS. However, proficiency standards on the 2012 and the 2013 state assessments could not be directly compared because the 2012 tests were designed to measure different learning standards than the 2013 Common Core tests. Therefore, the Department determined the scale

scores for each respective year that was associated with students who scored at the same percentile rank on the two assessments. The Department used these percentile ranks as the basis for determining which students must be provided AIS during the 2013-2014 transition year to ensure that the change in proficiency rates would not result in a significant increase in the percentage of students who must receive these services. The cut scores that the Department used resulted in districts being required to provide AIS to approximately the same percentages of students Statewide in the 2013-14 school year as received AIS in the 2012-13 school year. This was analogous to the action taken by the Regents in July 2010 to address the raising of the cut scores on the 2010 Grade 3-8 English language arts and mathematics assessments.

Under the approved regulation, districts were required to establish a policy to determine what services, if any, to provide in the 2013-14 school year to students who scored above the transitional cut scores established by the Department but below proficiency on the 2013 assessments.

Specifically, the amendment provided that for the 2013-2014 school year only:

- Students who scored at or below the specified cut points for Grades 3-8 English Language Arts and mathematics must receive academic intervention instructional services.
- Students who scored at or above the specified cut points but below the 2013 level 3/proficient cut points would not be required to receive academic intervention instructional and/or student support services unless the school district deemed it necessary.
- Each school district developed and maintained on file a uniform process by which the district determined whether to offer AIS during the 2013-14 school year to students who scored at or above the specified cut points but below the level 3/proficient on grade 3-8 English Language Arts or mathematics State assessments in 2013-14.
- Each school by November 1, 2013 either posted a description of this process to its Website or distributed to parents in writing a description of such process.

The proposed amendment would extend the 2013-2014 amendment to the Commissioner's Regulations through the 2014-15 school year to continue flexibility in the provision of Academic Intervention Services.

#### 4. COSTS:

- (a) Costs to State government: None.
- (b) Costs to local government: None.
- (c) Costs to private regulated parties: None.
- (d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year. The proposed amendment will not impose any additional costs but instead will allow for continued flexibility and reduced costs to school districts in providing AIS.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments but merely extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year. The proposed amendment will not impose any additional compliance requirements but instead will allow for continued flexibility to school districts in providing AIS.

#### 6. PAPERWORK:

The proposed amendment does not impose any specific recordkeeping, reporting or other paperwork requirements.

#### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal regulations.

#### 8. ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed amendment is necessary to implement Regents policy to provide flexibility to school districts in providing AIS during the 2014-2015 school year.

#### 9. FEDERAL STANDARDS:

There are no related federal standards.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

#### *Regulatory Flexibility Analysis*

##### Small Businesses:

The proposed amendment extends to the 2014-2015 school year the modified requirements for the provision of Academic Intervention Services (AIS) previously implemented for the 2013-2014 school year, to allow for continued flexibility to school districts in providing AIS.

The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed

amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

#### Local Government:

##### 1. EFFECT OF RULE:

The proposed amendment applies to each of the 689 public school districts in the State.

##### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements upon local governments but merely extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year in recognition of the fact that the State assessments administered to New York students in Spring 2013 were the first that measured the progress of students in meeting the expectations of the Common Core Learning Standards (CCLS). The proposed amendment will not impose any additional compliance requirements but instead will allow for continued flexibility to school districts in providing AIS.

##### 3. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on school districts.

##### 4. COMPLIANCE COSTS:

The proposed amendment extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year. The proposed amendment will not impose any additional costs but instead will allow for flexibility and reduced costs to school districts in providing AIS.

##### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any technological requirements or costs on school districts.

##### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to provide flexibility to school districts in providing AIS during the 2014-2015 school year. The proposed amendment does not impose any additional compliance requirements or costs on local governments but merely extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year, to allow for continued flexibility to school districts in providing AIS.

##### 7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

#### *Rural Area Flexibility Analysis*

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

##### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional compliance requirements upon rural areas but merely extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year in recognition of the fact that the State assessments administered to New York students in Spring 2013 were the first that measured the progress of students in meeting the expectations of the Common Core Learning Standards (CCLS). The proposed amendment will provide flexibility to school districts in providing AIS services.

The proposed amendment imposes no additional professional services requirements on school districts in rural areas.

##### 3. COMPLIANCE COSTS:

The proposed amendment extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year. The proposed amendment will not impose any additional costs but instead will allow for flexibility and reduced costs to school districts in providing AIS.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on local governments but merely extends to the 2014-2015 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 school year in recognition of the fact that the State assessments administered to New York students in Spring 2013 were the first that measured the progress of students in meeting the expectations of the Common Core Learning Standards (CCLS).

The proposed amendment is necessary to implement Regents policy to provide flexibility to school districts in providing AIS during the 2014-

2015 school year. Because the Regents policy upon which the proposed amendment is based uniformly applies to all school districts throughout the State, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt school districts in rural areas from coverage by the proposed amendment.

#### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

#### Job Impact Statement

The proposed amendment extends to the 2014-2015 school year the modified requirements for the provision of Academic Intervention Services (AIS) previously implemented for the 2013-2014 school year, to allow for continued flexibility to school districts in providing AIS. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

### EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Determination of Student Residency

**I.D. No.** EDU-52-14-00014-EP

**Filing No.** 1059

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Proposed Action:** Amendment of section 100.2(y) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 305(1), (2), (20), 3202(1), 3205(1), 3713(1) and (2)

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** The proposed amendment is designed to: (1) address reports that districts are denying enrollment of unaccompanied minors and undocumented youths if they are unable to produce documents sufficiently demonstrating age, guardianship, and/or residency in a district; and (2) provide clear requirements for school districts regarding enrollment of students, particularly as it pertains to procedures for unaccompanied minors and other undocumented youths.

Many school districts across the State have experienced an influx of unaccompanied minors and other undocumented youths. It has been reported that some school districts are refusing to enroll unaccompanied minors and undocumented youths if they, or their families or guardians, are unable to produce documents sufficiently demonstrating guardianship and/or residency in a district. These enrollment policies, as well as highly restrictive requirements for proof of residency, may impede or prevent many unaccompanied minors and undocumented youths from enrolling or attempting to enroll in school districts throughout the State. The proposed amendment is necessary to ensure that all children are enrolled in school, regardless of immigration status, pursuant to New York State and Federal law and to ensure that all school districts understand and comply with their obligation to enroll all resident students regardless of their immigration status.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the March 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the March meeting, would be April 1, 2015, the date a Notice of Adoption would be published in the State Register.

However, emergency action to adopt the proposed rule is necessary now for the preservation of the general welfare to ensure immediate compliance with federal and State laws regarding access to a free public education system and to provide clear requirements for school districts regarding the enrollment of students, particularly as it pertains to procedures for unaccompanied minors and other undocumented youths.

It is anticipated that the proposed amendment will be presented for

adoption as a permanent rule at the March 16-17, 2015 Regents meeting, which is the first meeting scheduled after expiration of the 45-day period for public comment pursuant to the State Administrative Procedure Act.

**Subject:** Determination of student residency.

**Purpose:** Clarify requirements on student enrollment, particularly as to procedures for unaccompanied minors and other undocumented youth.

**Text of emergency/proposed rule:** Subdivision (y) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 16, 2014, as follows:

(y) Determination of student residency *and age*. [The board of education or its designee shall determine whether a child is entitled to attend the schools of the district.]

(1) *Each school district shall make publicly available its enrollment forms, procedures, instructions and requirements for determinations of student residency and age in accordance with this subdivision. Such publicly available information shall include a non-exhaustive list of the forms of documentation that may be submitted to the district by parents, persons in parental relation or children, as appropriate, in accordance with the provisions of this subdivision. Such list shall include but not be limited to all examples of documentation listed in this subdivision. By no later than January 31, 2015, such information shall be included in the district's existing enrollment/registration materials and shall be provided to all parents, persons in parental relation or children, as appropriate, who request enrollment in the district, and shall be posted on the school district's website, if one exists.*

(2) *When a child's parent(s), the person(s) in parental relation to the child or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and shall begin attendance on the next school day, or as soon as practicable. Within three business days of such initial enrollment, the board of education or its designee must review all documentation submitted by the child's parent(s), the person(s) in parental relation to the child or the child, as appropriate, and make a residency determination in accordance with the following:*

(i) *Documentation Regarding Enrollment and/or Residency.*

(a) *The district shall not request on any enrollment/registration form(s) or in any meeting or other form of communication any of the following documentation and/or information at the time of and/or as a condition of enrollment:*

(1) *Social Security card or number; or*

(2) *any information regarding or which would tend to reveal the immigration status of the child, the child's parent(s) or the person(s) in parental relation, including but not limited to copies of or information concerning visas or other documentation indicating immigration status.*

(b) *The district may require that the parent(s) or person(s) in parental relation submit documentation and/or information establishing physical presence of the parent(s) or person(s) in parental relation and the child in the school district. Such documentation may include but shall not be restricted to: (1) a copy of a residential lease or proof of ownership of a house or condominium, such as a deed or mortgage statement; (2) a statement by a third-party landlord, owner or tenant from whom the parent(s) or person(s) in parental relation leases or with whom they share property within the district, which may be either sworn or unsworn; or (3) such other statement by a third party establishing the parent(s)' or person(s) in parental relation's physical presence in the district. If the documentation listed in this clause is not available, the district shall consider other forms of documentation and/or information establishing physical presence in the district, in lieu of those described in this clause, which may include but not be limited to those listed in clause (d) of this subparagraph.*

(c) *The district may also require the parent(s) or person(s) in parental relation to provide an affidavit either: (1) indicating that they are the parent(s) with whom the child lawfully resides; or (2) indicating that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise. A district may also accept other proof, such as documentation indicating that the child resides with a sponsor with whom the child has been placed by a federal agency. A district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.*

(d) *The district shall consider other forms of documentation produced by the child, the child's parent(s) or person(s) in parental relation, including but not limited to the following:*

(1) *pay stub;*

(2) *income tax form;*

(3) *utility or other bills;*

(4) *membership documents (e.g., library cards) based upon residency;*

(5) *voter registration document(s);*

(6) official driver's license, learner's permit or non-driver identification;

(7) state or other government issued identification;

(8) documents issued by federal, state or local agencies (e.g., local social service agency, federal Office of Refugee Resettlement); or

(9) evidence of custody of the child, including but not limited to judicial custody orders or guardianship papers.

(ii) Documentation of Age. In accordance with Education Law § 3218:

(a) where a certified transcript of a birth certificate or record of baptism (including a certified transcript of a foreign birth certificate or record of baptism) giving the date of birth is available, no other form of evidence may be used to determine a child's age;

(b) where the documentation listed in clause (a) of this subparagraph is not available, a passport (including a foreign passport) may be used to determine a child's age; and

(c) where the documentation listed in both clauses (a) and (b) of this subparagraph are not available, the school district may consider certain other documentary or recorded evidence in existence two years or more, except an affidavit of age, to determine a child's age. Such other evidence may include but not be limited to the following:

(1) official driver's license;

(2) state or other government issued identification;

(3) school photo identification with date of birth;

(4) consulate identification card;

(5) hospital or health records;

(6) military dependent identification card;

(7) documents issued by federal, state or local agencies (e.g., local social service agency, federal Office of Refugee Resettlement);

(8) court orders or other court-issued documents;

(9) Native American tribal document; or

(10) records from non-profit international aid agencies and voluntary agencies.

(d) With respect to the documentation listed in clause (c) of this subparagraph, if the documentary evidence presented originates from a foreign country, a school district may request verification of such documentary evidence from the appropriate foreign government or agency, consistent with the requirements of the federal Family Educational Rights and Privacy Act (20 USC § 1232g), provided that the student must be enrolled within in accordance with paragraph (2) of this subdivision and such enrollment cannot be delayed beyond the period specified in paragraph (2) of this subdivision while the district attempts to obtain such verification.

(iii) School districts are required to comply with Public Health Law § 2164(7) and all other applicable provisions of the Public Health Law and its implementing regulations, including orders issued by a state or local health department pursuant to such laws or regulations, that impact a student's admission to or attendance in school. Nothing in this subdivision shall be construed to require the immediate attendance of an enrolled student lawfully excluded from school temporarily pursuant to Education Law § 906 because of a communicable or infectious disease that imposes a significant risk of infection of others, or an enrolled student whose parent(s) or person(s) in parental relation have not submitted proof of immunization within the periods prescribed in Public Health Law § 2164(7)(a), or an enrolled student who is suspended from instruction for disciplinary reasons pursuant to Education Law § 3214. Nothing in this subdivision shall be construed to interfere with the recordkeeping and reporting requirements imposed on school districts participating in the federal Student and Exchange Visitor Program (SEVP) in grades 9-12 pursuant to applicable federal laws and regulations concerning nonimmigrant alien students who identify themselves as having or seeking nonimmigrant student visa status (F-1 or M-1), and nothing herein shall be construed to conflict with such requirements or to relieve such nonimmigrant alien students who have or seek an F-1 or M-1 visa from fulfilling their obligations under federal law and regulations related to enrolling in grades 9-12 in SEVP schools.

(3) Within three business days of a child's initial enrollment, the board of education or its designee shall determine whether a child is entitled to attend the schools of the district. For purposes of this paragraph, prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child's parent, the person in parental relation to the child or the child, as appropriate, an opportunity to submit information concerning the child's right to attend school in the district, which shall be the information submitted by the parent(s) or person(s) in parental relation pursuant to paragraph (2) of this subdivision.

(4) At any time during the school year, the board of education or its designee may determine, in accordance with paragraph (6) of this subdivision, that a child is not a district resident entitled to attend the schools of the district.

(5) Determinations regarding whether a child is entitled to attend a district's schools as a homeless child or youth must be made in accordance with subdivision (x) of this section.

(6) Any decision by a school official, other than the board or its designee, that a child is not entitled to attend the schools of the district shall include notification of the procedures to obtain review of the decision within the school district. Prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child's parent, the person in parental relation to the child or the child, as appropriate, the opportunity to submit information concerning the child's right to attend school in the district *except as otherwise provided in paragraph (3) of this subdivision*. When the board of education or its designee determines that a child is not entitled to attend the schools of such district because such child is [neither] *not* a resident of such district [nor entitled to attend its schools pursuant to subdivision (x) of this section], such board or its designee shall, within two business days, provide written notice of its determination to the child's parent, to the person in parental relation to the child, or to the child, as appropriate. Such written notice shall state:

[(1)] (i) that the child is not entitled to attend the public schools of the district;

[(2)] (ii) the specific basis for the determination that the child is [neither] *not* a resident of the school district [nor entitled to attend its schools pursuant to subdivision (x) of this section], *including but not limited to a description of the documentary or other evidence upon which such determination is based;*

[(3)] (iii) the date as of which the child will be excluded from the schools of the district; and

[(4)] (iv) that the determination of the board may be appealed to the Commissioner of Education, in accordance with Education Law, section 310, within 30 days of the date of the determination, and that the instructions, forms and procedures for taking such an appeal, *including translated versions of such instructions, forms and procedures*, may be obtained from the Office of Counsel at [www.counsel.nysed.gov](http://www.counsel.nysed.gov), or by mail addressed to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234 or by calling the Appeals Coordinator at (518) 474-8927.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 15, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: [legal@nysed.gov](mailto:legal@nysed.gov)

**Data, views or arguments may be submitted to:** Cosimo Tangorra, Jr., Deputy Commissioner, State Education Department, Office of P-12 Education, State Education Building, 2M West, 89 Washington Ave., Albany, NY 12234, (518) 474-5520, email: [NYSEDP12@nysed.gov](mailto:NYSEDP12@nysed.gov)

**Public comment will be received until:** 45 days after publication of this notice.

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### Regulatory Impact Statement

##### STATUTORY AUTHORITY:

Education Law section 207 empowers the Regents and Commissioner to adopt rules and regulations to carry out the State laws regarding education and the functions and duties conferred on the State Education Department (SED).

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(2) authorizes the Commissioner with such powers and duties as are charged by the Regents.

Education Law section 3202(1) specifies the school district in which children over five and under twenty-one years of age, who have not yet received a high school diploma and who are residing in New York State, are entitled to attend school without the payment of tuition, and is intended to assure that each child residing within the State is able to attend school on a tuition-free basis.

Education Law section 3205(1) requires each child of compulsory school age to attend upon full time day instruction.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept Federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with Federal agencies to implement such law.

##### LEGISLATIVE OBJECTIVES:

Consistent with the above statutory authority, the proposed amendment will codify applicable federal and State laws, as well as existing State

Education Department (SED) guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education.

#### NEEDS AND BENEFITS:

Many school districts across the State have experienced an influx of unaccompanied minors and other undocumented youths. It has been reported that some school districts are refusing to enroll unaccompanied minors and undocumented youths if they, or their families or guardians, are unable to produce documents sufficiently demonstrating guardianship and/or residency in a district. These enrollment policies, as well as highly restrictive requirements for proof of residency, have impeded or prevented many unaccompanied minors and undocumented youths from enrolling in school districts throughout the State.

Under federal and State law, all children have a right to a free public education, regardless of immigration status. The New York Education Law entitles each person over five and under twenty-one years of age, who has not received a high school diploma, to attend a public school in the district in which such person resides. Furthermore, school districts must ensure that all resident students of compulsory school age attend upon full-time instruction [see Educ. Law § § 3202(1), 3205]. Under federal law, school districts may not deny resident students a free public education on the basis of their immigration status. The United States Supreme Court has held that allowing undocumented students to be denied an education would, in effect, “deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Plyler v. Doe*, 457 U.S. 202, 223 (1982). Under established law, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to such student’s entitlement to an elementary and secondary public education (See, e.g., 42 U.S.C. § § 2000c-6, 2000-d; 28 C.F.R. § 42.104(b)(2); 34 C.F.R. § 100.3(b)(2) (Titles IV and VI of the Civil Rights Act of 1964 and associated federal regulations, prohibiting discrimination on the basis of, inter alia, race, color, or national origin by public elementary and secondary schools). Moreover, unaccompanied minors and undocumented youth may also be entitled to the protections of the federal McKinney-Vento Homeless Education Assistance Improvements Act, 42 U.S.C. § 11431, et seq., and implementing State law and regulations concerning the education of homeless children. Together, these federal and State laws are driven by the dual purposes of ensuring student access to, and continuity within, a free public education system.

In late October 2014, the New York Civil Liberties Union released a study (See <http://www.nyclu.org/news/nyclu-survey-ny-school-districts-illegally-denying-education-immigrant-children>) indicating that as many as 20% of school districts in New York State may maintain facially impermissible enrollment policies, and noting the following findings:

- 73 school districts require birth certificates for enrollment, 19 of which specify they require a student’s “original” birth certificate;
- 16 school districts require a student’s immigration status for enrollment;
- 10 school districts require Social Security cards for enrollment;
- 6 districts ask students whether they are a “migrant worker” at enrollment; and
- 9 school districts ask students whether or not they are U.S. citizens in enrollment.

In addition, SED and the New York State Attorney General have received inquiries from districts across the State regarding their obligations under federal and State law. These inquiries make clear the need for more comprehensive action to address the lack of clarity among districts regarding lawful enrollment and registration policies.

The proposed amendment will codify applicable federal and State laws, as well as existing SED guidance to districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. Specifically, the proposed amendment will establish:

- (1) Clear and uniform requirements, which comply with federal and State laws and SED guidance on enrollment of students, particularly for unaccompanied minors and undocumented youths;
- (2) Prohibited enrollment application policies which are unlawful and/or have had a disparate impact on unaccompanied minors and undocumented youths;
- (3) Flexible enrollment requirements, which allow districts to accept additional forms of proof beyond the highly restrictive forms listed in the enrollment instructions/materials of school districts under review to date; and
- (4) Ensure there is clear guidance to parents and guardians, and that enrollment instructions are provided publicly, in both paper and electronic forms.

#### COSTS:

- Costs to State: none.
- Costs to local governments: none.

Costs to private regulated parties: none.

Costs to the regulating agency for implementation and continued administration of the rule: none.

The proposed amendment merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. In general, the proposed amendment will not impose any additional costs beyond those inherent in such applicable laws. There may be costs associated with making publicly available a district’s enrollment forms, procedures, instructions and requirements for determinations of student residency and age. However, any such costs are believed to be minimal and capable of being absorbed using existing district staff and resources.

#### LOCAL GOVERNMENT MANDATES:

Each school district shall make publicly available its enrollment forms, procedures, instructions and requirements for determinations of student residency and age, including a non-exhaustive list of the forms of documentation that may be submitted to the district, as specified in the regulation. By no later than January 31, 2015, such information shall be included in the district’s existing enrollment/registration materials and be provided to all parents/persons in parental relation or children, as appropriate, who request enrollment in the district, and be posted on the district’s website, if one exists.

When a child’s parent(s)/person(s) in parental relation or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and begin attendance on the next school day, or as soon as practicable. Within three business days of initial enrollment, the board of education or its designee must review all documentation submitted by the child’s parent(s), the person(s) in parental relation to the child or the child, as appropriate, and make a residency determination in accordance with the regulation. Prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child’s parent/person in parental relation or the child, as appropriate, an opportunity to submit information concerning the child’s right to attend school in the district, as specified in the regulation. At any time during the school year, the board of education or its designee may determine, in accordance with the regulation, that a child is not a district resident entitled to attend the schools of the district. Determinations regarding whether a child is entitled to attend a district’s schools as a homeless child or youth must be made in accordance with section 100.2(x) of the Commissioner’s Regulations.

School districts are required to comply with Public Health Law § 2164(7) and all other applicable provisions of the Public Health Law and its implementing regulations, including orders issued by a state or local health department pursuant to such laws or regulations, that impact a student’s admission to or attendance in school.

#### PAPERWORK:

The regulation provides that the district may require parents/persons in parental relation or the child, as appropriate, to submit documentation/information establishing physical presence in the school district, as specified in the regulation. If the documentation is not available, the district shall consider other forms of documentation/information establishing physical presence in the district, as specified in the regulation. The district may also require the parent(s)/person(s) in parental relation to provide an affidavit either: (1) indicating that they are the parent(s) with whom the child lawfully resides; or (2) indicating that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise. A district may also accept other proof, such as documentation indicating that the child resides with a sponsor with whom the child has been placed by a federal agency. A district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.

#### DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements, but merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education.

#### ALTERNATIVES:

The proposed amendment is necessary to codify applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. There are no significant alternatives to the proposed amendment and none were considered.

#### FEDERAL STANDARDS:

The proposed amendment is necessary to codify applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amend-

ment will not impose any additional compliance requirements beyond those inherent in such applicable laws.

#### COMPLIANCE REQUIREMENTS:

It is anticipated regulated parties will be able to achieve compliance with the rule by its effective date. The proposed amendment merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment will not impose any additional compliance requirements or costs beyond those inherent in such applicable laws.

#### *Regulatory Flexibility Analysis*

##### Small Businesses:

The proposed amendment relates to student enrollment, and will codify applicable federal and State laws, as well as existing State Education Department guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. No further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### 1. EFFECT OF RULE:

The proposed amendment applies to each school district in the State. There are presently 689 school districts in the State.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment will not impose any additional compliance requirements beyond those inherent in such applicable laws.

Each school district shall make publicly available its enrollment forms, procedures, instructions and requirements for determinations of student residency and age, including a non-exhaustive list of the forms of documentation that may be submitted to the district, as specified in the regulation. By no later than January 31, 2015, such information shall be included in the district's existing enrollment/registration materials and be provided to all parents/persons in parental relation or children, as appropriate, who request enrollment in the district, and be posted on the district's website, if one exists.

When a child's parent(s)/person(s) in parental relation or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and begin attendance on the next school day, or as soon as practicable. Within three business days of initial enrollment, the board of education or its designee must review all documentation submitted by the child's parent(s), the person(s) in parental relation to the child or the child, as appropriate, and make a residency determination in accordance with the regulation. Prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child's parent/person in parental relation or the child, as appropriate, an opportunity to submit information concerning the child's right to attend school in the district, as specified in the regulation. At any time during the school year, the board of education or its designee may determine, in accordance with the regulation, that a child is not a district resident entitled to attend the schools of the district. Determinations regarding whether a child is entitled to attend a district's schools as a homeless child or youth must be made in accordance with section 100.2(x) of the Commissioner's Regulations.

School districts are required to comply with Public Health Law § 2164(7) and all other applicable provisions of the Public Health Law and its implementing regulations, including orders issued by a state or local health department pursuant to such laws or regulations, that impact a student's admission to or attendance in school.

The regulation provides that the district may require parents/persons in parental relation or the child, as appropriate, to submit documentation/information establishing physical presence in the school district, as specified in the regulation. If the documentation is not available, the district shall consider other forms of documentation/information establishing physical presence in the district, as specified in the regulation. The district may also require the parent(s)/person(s) in parental relation to provide an affidavit either: (1) indicating that they are the parent(s) with whom the child lawfully resides; or (2) indicating that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise. A district may also accept other proof, such as documentation indicating that the child resides with a sponsor with whom the child has been placed by a

federal agency. A district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.

#### 3. PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional service requirements on local governments.

#### 4. COMPLIANCE COSTS:

The proposed amendment merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. In general, the proposed amendment will not impose any additional costs on local governments beyond those inherent in such applicable laws. There may be costs associated with making publicly available a district's enrollment forms, procedures, instructions and requirements for determinations of student residency and age. However, any such costs are believed to be minimal and capable of being absorbed using existing district staff and resources.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed above under compliance costs.

#### 6. MINIMIZE ADVERSE IMPACT:

The proposed amendment is necessary to codify applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment will not impose any additional compliance requirements on local governments beyond those inherent in such applicable laws.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts.

#### 8. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed rule is necessary to codify applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. Changes to such federal and State laws would be necessary before the proposed rule may be revised. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 16. of the Notice of Emergency Adoption and Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

#### *Rural Area Flexibility Analysis*

#### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

#### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment will not impose any additional compliance requirements beyond those inherent in such applicable laws.

Each school district shall make publicly available its enrollment forms, procedures, instructions and requirements for determinations of student residency and age, including a non-exhaustive list of the forms of documentation that may be submitted to the district, as specified in the regulation. By no later than January 31, 2015, such information shall be included in the district's existing enrollment/registration materials and be provided to all parents/persons in parental relation or children, as appropriate, who request enrollment in the district, and be posted on the district's website, if one exists.

When a child's parent(s)/person(s) in parental relation or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and begin attendance on the next school day, or as soon as practicable. Within three business days of initial enrollment, the board of education or its designee must review all documentation submitted by the child's parent(s), the person(s) in parental relation to the child or the child, as appropriate, and make a residency determination in accor-

dance with the regulation. Prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child's parent/person in parental relation or the child, as appropriate, an opportunity to submit information concerning the child's right to attend school in the district, as specified in the regulation. At any time during the school year, the board of education or its designee may determine, in accordance with the regulation, that a child is not a district resident entitled to attend the schools of the district. Determinations regarding whether a child is entitled to attend a district's schools as a homeless child or youth must be made in accordance with section 100.2(x) of the Commissioner's Regulations.

School districts are required to comply with Public Health Law § 2164(7) and all other applicable provisions of the Public Health Law and its implementing regulations, including orders issued by a state or local health department pursuant to such laws or regulations, that impact a student's admission to or attendance in school.

The regulation provides that the district may require parents/persons in parental relation or the child, as appropriate, to submit documentation/information establishing physical presence in the school district, as specified in the regulation. If the documentation is not available, the district shall consider other forms of documentation/information establishing physical presence in the district, as specified in the regulation. The district may also require the parent(s)/person(s) in parental relation to provide an affidavit either: (1) indicating that they are the parent(s) with whom the child lawfully resides; or (2) indicating that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise. A district may also accept other proof, such as documentation indicating that the child resides with a sponsor with whom the child has been placed by a federal agency. A district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.

The rule does not impose any additional professional service requirements on rural areas.

### 3. COMPLIANCE COSTS:

The proposed amendment merely codifies applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. In general, the proposed amendment will not impose any additional costs on rural areas beyond those inherent in such applicable laws. There may be costs associated with making publicly available a district's enrollment forms, procedures, instructions and requirements for determinations of student residency and age. However, any such costs are believed to be minimal and capable of being absorbed using existing district staff and resources.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to codify applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment will not impose any additional compliance requirements on rural areas beyond those inherent in such applicable laws. The proposed rule has been carefully drafted to ensure that such State and federal requirements are met. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for those located in rural areas.

### 5. RURAL AREA PARTICIPATION:

The proposed rule was submitted for review and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

### 6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed rule is necessary to codify applicable federal and State laws, as well as existing SED guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. Changes to such federal and State laws would be necessary before the proposed rule may be revised. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 16. of the Notice of Emergency Adoption and Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

### Job Impact Statement

The proposed amendment relates to student enrollment, and will codify applicable federal and State laws, as well as existing State Education

Department guidance to school districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

## EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Profession of Applied Behavior Analysis

**I.D. No.** EDU-52-14-00015-EP

**Filing No.** 1060

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Proposed Action:** Amendment of sections 29.2, 52.44, 52.45, 59.14 and Subparts 79-17 and 79-18 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6503-a, 6504(not subdivided), 6507(2)(a), 6509(9), 8800, 8801, 8802, 8803, 8804, 8805, 8806, 8807 and 8808; L. 2013, ch. 554 and L. 2014, ch. 8

**Finding of necessity for emergency rule:** Preservation of public health and general welfare.

**Specific reasons underlying the finding of necessity:** The proposed rule is necessary to implement Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which took effect on July 1, 2014. This amendment to the Education Law establishes and defines the practice of the profession of applied behavior analysis. Pursuant to Chapter 554, the purpose of applied behavior analysis is to provide behavioral health treatment for persons with autism and autism spectrum disorders and related disorders. It also establishes the requirements for licensed behavior analyst and certified behavior analyst assistant education programs, which include registration and curriculum requirements for programs offered in New York State that lead to licensure as a licensed behavior analyst or certification as a certified behavior analyst assistant. In addition, this amendment to the Education Law establishes a waiver of the licensure requirement for certain specified entities that provide applied behavior analysis services as defined in Article 167 of the Education Law. It further establishes requirements for the licensure of licensed behavior analysts and certified behavior analyst assistants, which include, but are not limited to, professional education, experience, examination and limited permit requirements. This amendment to the Education Law also provides a grandparenting licensure/certification pathway, which the Department is referring to as Pathway One, for individuals who are certified or registered by a national certifying body and submit an attestation of moral character and an application to the State Education Department within two years of the January 10, 2014 effective date of this provision of the statute. Although Pathway One will expire on January 9, 2016, the licenses and certifications issued under it will not. Additionally, this amendment adds the profession of applied behavior analysis to the list of health care professions that are subject to the Education Laws' unprofessional conduct provisions.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 45-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the March 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the March meeting, would be April 1, 2015, the date a Notice of Adoption would be published in the State Register. However, the provisions of Chapter 554 and Chapter 8 became effective July 1, 2014.

Therefore, emergency action is necessary at the December 2014 Regents meeting for the preservation of the public health and general welfare in order to enable the State Education Department to immediately establish requirements to timely implement Chapter 554 and Chapter 8, so that applicants for licensure as licensed behavior analysts and certified behavior analyst assistants, who do not meet the requirements for licensure and/or certification under Pathway One, will be able to be licensed as licensed behavior analysts or certified behavior analyst assistants, if they

meet the licensure or certification requirements of the proposed rule, which will increase the number of licensed professionals qualified to practice applied behavior analysis.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the March 16-17, 2015 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

**Subject:** Profession of Applied Behavior Analysis.

**Purpose:** To implement chapter 554 of the Laws of 2013 and chapter 8 of the Laws of 2014.

**Substance of emergency/proposed rule (Full text is posted at the following State website: <http://www.regents.nysed.gov/meeting>):** The Commissioner of Education proposes to amend section 29.2 of the Rules of the Board of Regents, add sections 52.44 and 52.45 to the Regulations of the Commissioner of Education, amend section 59.14 of the Regulations of the Commissioner of Education, and add Subparts 79-17 and 79-18 to the Regulations of the Commissioner of Education, relating to the licensure of behavior analysts and certification of behavior analyst assistants under Article 167 of the Education Law as added by Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014. The following is a summary of the substance of the proposed rule:

Subdivisions (a) and (b) of section 29.2 of the Rules of the Board of Regents are amended to add the profession of applied behavior analysis to the list of health care professions that are subject to its unprofessional conduct provisions.

Section 52.44 is added to the Regulations of the Commissioner of Education to establish the requirements for licensed behavior analyst education programs. These requirements include registration and curriculum requirements for programs offered in New York State that lead to licensure as a licensed behavior analyst. Section 52.44 further requires licensed behavior analyst education programs to be a program in applied behavior analysis leading to a master's degree or higher degree, which must require at least one year of full-time study or the equivalent; or a program in applied behavioral analysis leading to an advanced certificate which ensures that each student holds a master's or higher degree in subject areas, including, but not limited to, psychology, education or other subject areas that address learning and behavioral change as determined by the Department.

Section 52.45 is added to the Regulations of the Commissioner of Education to establish the requirements for certified behavior analyst assistant education programs. These requirements include registration and curriculum requirements for programs offered in New York State that lead to certification as a certified behavior analyst assistant. Section 52.45 further requires certified behavior analyst assistant education programs to be a program in applied behavior analysis leading to a bachelor's or higher degree; or a program in applied behavior analysis leading to a certificate which ensures that each student holds a bachelor's degree or a higher degree in subject areas, including, but not limited to, psychology, education or other subject areas that address learning and behavioral change as determined by the Department.

Paragraph (1) of subdivision (a) of section 59.14 of the Regulations of the Commissioner of Education is amended to implement that portion of Chapter 554 of the Laws of 2013 which includes applied behavior analysis among the professions for which a waiver of certain corporate practice restrictions is available.

Subpart 79-17 is added to the Regulations of the Commissioner of Education to establish the requirements for licensure as a licensed behavior analyst, which include, but are not limited to, professional education, experience, examination, limited permit requirements and reiterates the exemptions to the practice of applied behavior analysis set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014.

Subpart 79-18 is added to the Regulations of the Commissioner of Education to establish the requirements for certification as a certified behavior analyst assistant, which include, but are not limited to, professional education, experience, examination, limited permit requirements and reiterates the exemptions to the practice of applied behavior analysis set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 15, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: [legal@nysed.gov](mailto:legal@nysed.gov)

**Data, views or arguments may be submitted to:** Office of the Professions, Office of the Deputy Commissioner, State Education Department, State

Education Building 2M, 89 Washington Ave., Albany, NY 12234, (518) 486-1765, email: [opdepcom@nysed.gov](mailto:opdepcom@nysed.gov)

**Public comment will be received until:** 45 days after publication of this notice.

#### **Regulatory Impact Statement**

##### **1. STATUORY AUTHORITY:**

Section 207 of the Education Law grants general rule-making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 6503-a of the Education Law authorizes the State Education Department to issue a waiver of certain corporate practice restrictions for specified professions.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subparagraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and the practice of the professions.

Section 6509(9) of the Education Law authorizes the Board of Regents to define unprofessional conduct in the professions.

Section 8800 of the Education Law, as added by Chapter 554 of the Laws of 2013, establishes the new profession of applied behavior analysis.

Section 8801 of the Education Law, as added by Chapter 554 of the Laws of 2013, defines the profession of applied behavior analysis.

Section 8802 of the Education Law, as added by Chapter 554 of the Laws of 2013, defines the practice of applied behavior analysis by licensed behavior analysts and certified behavior analyst assistants.

Section 8803 of the Education Law, as added by Chapter 554 of the Laws of 2013, establishes protection for the titles "licensed behavior analyst" and "certified behavior analyst assistant."

Section 8804 of the Education Law, as added by Chapter 554 of the Laws of 2013, establishes the education, experience, examination, age, and moral character requirements for applicants seeking licensure as a licensed behavior analyst assistant and certification as a certified behavior analyst assistant.

Section 8805 of the Education Law, as added by Chapter 554 of the Laws of 2013, establishes a time limited licensure and certification pathway for individuals who meet the requirements for licensure or certification as a licensed behavior analyst or certified behavior analyst, except for the examination, experience and education requirements, if they are certified or registered by a national certifying body having certification or registration standards that are acceptable to the Commissioner of Education, and submit an application to the State Education Department within two years of the January 10, 2014 effective date of this provision of the statute.

Section 8806 of the Education Law, as added by Chapter 554 of the Laws of 2013, establish the requirements for limited permits for applicants for licensure as licensed behavior analysts and certification as certified behavior analyst assistants.

Section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014, establishes exemptions from the applied behavior analysis licensure and certification requirements.

Section 8808 of the Education Law, as added by Chapter 554 of the Laws of 2013, authorizes the Board of Regents, upon the recommendation of the Commissioner of Education, to appoint a State Board for Applied Behavior Analysis to assist on matters of licensing and professional conduct.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed rule implements Chapter 554 of the Laws of 2013, which added Article 167 to the Education Law, by establishing the requirements for licensure as a licensed behavior analyst and certification as a certified behavior analyst assistant which include, but are not limited to, professional education, experience, examination and limited permit requirements and reiterates the exemptions to the practice of applied behavior analysis set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014. Chapter 8 of the Laws of 2014 amended Chapter 554 to make changes necessary to the implementation of Chapter 554. The proposed rule also implements the statute by subjecting licensed behavior analysts and certified behavior analyst assistants to the general unprofessional conduct provisions for the health professions. In addition, the proposed rule implements the statute by establishing the program registration requirements for licensed behavior analyst and certified behavior analyst assistant education programs, which include registration and curriculum requirements for programs offered in New York State that lead to licensure or certification. The proposed rule further implements the statute by including applied behavior analysis among the professions for which a waiver of certain corporate practice restrictions is available.

Finally, Chapter 554 of the Laws of 2013 also provides a grandparent-

ing licensure/certification pathway, which the State Education Department is referring to as Pathway One, for individuals who are certified or registered by a national certifying body and submit an attestation of moral character and an application to the State Education Department within two years of the January 10, 2014 effective date of this provision of the statute. Although Pathway One will expire on January 9, 2016, the licenses and certifications issued under it will not.

### 3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to increase access to needed applied behavior analysis services to provide behavioral health treatment for persons with autism and autism spectrum disorders and related disorders, while protecting the public, by establishing licensure requirements for behavior analysts and certification requirements for behavior analyst assistants. The proposed rule is necessary to conform the Rules of the Board of Regents and the Regulations of the Commissioner of Education to Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014.

As required by statute, the proposed rule is also needed to establish the program registration requirements for behavior analyst and behavior analyst assistant education programs offered in New York State that lead to licensure or certification. Additionally, the proposed rule is needed to subject licensed behavior analysts and certified behavior analyst assistants to the general unprofessional conduct provisions for the health professions. The proposed rule is further needed to include applied behavior analysis among the professions for which a waiver of certain corporate practice restrictions is available and reiterate the exemptions to the practice of applied behavior analysis set forth in statute.

### 4. COSTS:

(a) Costs to State government: The proposed rule implements statutory requirements and establishes standards as directed by statute, and will not impose any additional costs on State government beyond those imposed by the statutory requirements.

(b) Costs to local government: There are no additional costs to local governments.

(c) Cost to private regulated parties: The proposed rule does not impose any additional costs to regulated parties beyond those imposed by statute. As required by Education Law section 8804(1)(g), applicants for certification as a certified behavior analyst assistant must pay a fee to the Department of \$150 for their initial license and a triennial registration fee of \$75. Additionally, as required by Education Law section 8804(2)(g), applicants for licensure as a licensed behavior analyst must pay a fee to the Department of \$200 for their initial license and a triennial registration fee of \$100. Higher education institutions that seek to register behavior analyst and/or behavior analyst assistant education programs with the Department, including those in rural areas, may incur costs related to the development and maintenance of such education programs and their registration. It is anticipated that such costs will be minimal because several higher education institutions are already offering courses that would or could, with adjustments, meet the registration requirements for a behavior analyst and/or behavior analyst assistant education programs, and that higher education institutions should be able to use their existing staffs and resources to revise their courses and curricula to meet the licensed behavior analyst and/or certified behavior analyst assistant requirements.

(d) Cost to the regulatory agency: The proposed rule does not impose any additional costs on the Department beyond those imposed by statute. Any associated costs to the Department will be offset by the fees charged to applicants and no significant cost will result to the Department.

### 5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of Article 167 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014, by establishing the standards for individuals to be licensed to practice as licensed behavior analysts and certified to practice as certified behavior analyst assistants and standards for behavior analyst and behavior analyst assistant education programs provided by institutions of higher education to ensure that only those properly educated and prepared to be licensed behavior analysts and certified behavior analyst assistants hold themselves out as such. It does not impose any program, service, duty, or responsibility upon local governments.

### 6. PAPERWORK:

The proposed rule imposes no new reporting or other paperwork requirements beyond those imposed by the statute.

### 7. DUPLICATION:

The proposed rule is necessary to implement Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014. There are no other state or federal requirements on the subject matter of this proposed rule. Therefore, the proposed rule does not duplicate other existing state or federal requirements.

### 8. ALTERNATIVES:

The proposed rule is necessary to conform the Rules of the Board of Regents and the Regulations of the Commissioner of Education to Chapter

554 of the Laws of 2013 and Chapter 8 of the Laws of 2014. There are no significant alternatives to the proposed rule and none were considered.

### 9. FEDERAL STANDARDS:

Since, there are no applicable federal standards for behavior analysts and behavior analyst assistants and behavior analyst and behavior analyst assistant education programs, the rule does not exceed any minimum federal standards for the same or similar subject areas.

### 10. COMPLIANCE SCHEDULE:

The proposed rule is necessary to conform the Rules of the Board of Regents and the Regulations of the Commissioner of Education to Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014. With the exception of the Pathway One licensure provisions described above, which became effective January 10, 2014, all the Education Law provisions of Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014 became effective July 1, 2014. The proposed rule was adopted by the Board of Regents on an emergency basis effective December 16, 2014 and is expected to be presented for permanent adoption at the March 16-17, 2015 Regents meeting with an effective date of April 1, 2015. It is anticipated that applicants for licensure or certification will be able to comply with the proposed rule by the effective date.

### Regulatory Flexibility Analysis

#### 1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 554 of the Laws of 2013, which establishes and defines the practice of the profession of applied behavior analysis (ABA) and Chapter 8 of the Laws of 2014, which amended Chapter 554 to make changes necessary to the implementation of Chapter 554.

Chapter 554 also provides a grandparenting licensure/certification pathway, which the State Education Department is referring to as Pathway One, for individuals who are certified or registered by a national certifying body and submit an attestation of moral character and an application to the State Education Department within two years of the January 10, 2014 effective date of this provision of the statute. Although Pathway One will expire on January 9, 2016, the licenses and certifications issued under it will not.

As of November 2014, the Behavior Analyst Certification Board listed 1,014 residents of New York State who possess a certification that may enable them to be licensed by New York State under the grandparenting provisions of the law that will remain in effect until January 9, 2016. The number of applicants who have been licensed in New York State under these grandparenting provisions as of December 4, 2014 is 551, including 104 persons who are also licensed in other professions in New York State, and 64 who reside outside the State. The number of persons who are certified as teachers in New York State who also hold this national certification is 173. As of December 1, 2014, the number of persons who have applied for licensure to whom the current regulations would apply is approximately 20. These 20 individuals are not eligible for licensure under Pathway One.

Additionally, the number of individuals who are providing applied behavior analysis services and activities and employed by a small business or local government in New York State is currently not available and is unknown. Some of these unknown individuals may further fall under one of the exemptions to the licensure and certification requirements set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014. However, the number of these exempted individuals is not available and is unknown.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed rule implements Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which establish the new profession of applied behavior analysis and the requirements for licensure as a licensed behavior analyst and certification as a certified behavior analyst assistant. These requirements include, but are not limited to, professional education, experience, examination and limited permit requirements. The proposed rule also reiterates the exemptions to the practice of applied behavior analysis set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014. Individuals seeking licensure to practice in New York State will be required to submit an application with the State Education Department and meet all the requirements for licensure, which include, but are not limited to, the professional study, experience, and examination requirements specified in the proposed rule. Individuals seeking to work in New York State after completing all requirements for licensure except the examination and/or experience requirements will be required to submit a limited permit application to the State Education Department as specified in the proposed rule.

#### 3. PROFESSIONAL SERVICES:

Unless one of the exemptions to the licensure and certification requirements apply to their employees, who provide applied behavior analysis services in the course of their employment, the proposed rule will require small businesses and local governments to use only licensed behavior

analysts and/or certified behavior analyst assistants to provide applied behavior services. It is not anticipated that small businesses or local governments will need professional services to comply with the proposed rule.

#### 4. COMPLIANCE COSTS:

The proposed rule does not impose any direct costs on small business or local governments. As stated above, unless one of the exemptions to the licensure and certification requirements set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014, applies to their employees, the proposed rule will require small businesses and local governments to use only licensed behavior analysts and/or certified behavior analyst assistants to provide applied behavior services. Sections 8804(1)(g) and (2)(g) of the Education Law, as added by Chapter 554 of the Laws of 2013, require a fee of \$150 for an initial license and a triennial registration fee of \$75 for certified behavior analyst assistants and a fee of \$200 for an initial license and a triennial registration fee of \$100 for each triennial registration period for licensed behavior analysts. Section 8806(3) of the Education Law, as added by Chapter 554 of the Laws of 2013, imposes a limited permit fee of \$70 to allow an individual who meets all the requirements for licensure, except the examination and/or experience requirements, to practice under supervision for one year.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and the proposed rule is economically feasible. See above "Compliance Costs" for the economic impact of the regulation.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which established the new profession of applied behavior analysis and the requirements for licensure as a licensed behavior analyst and certification as a certified behavior analyst assistant. These requirements include, but are not limited to, professional education, experience, examination and limited permit requirements. Chapter 554 and Chapter 8 authorize the State Education Department to define, in regulation, the standards to be met for licensure as a licensed behavior analyst and certification as a certified behavior analyst assistant. Individuals seeking licensure to practice in New York State will be required to submit an application with the State Education Department and meet all the requirements for licensure, which include, but are not limited to, the professional study, experience, and examination requirements specified in the proposed rule. Individuals seeking to work in New York State after completing all requirements for licensure except the examination and/or experience requirements will be required to submit a limited permit application to the State Education Department as specified in the proposed rule. The proposed fee structure was determined by the legislature to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. It was determined that the licensure of behavior analysts and certification of behavior analyst assistants who meet minimum requirements established in the proposed rule best ensures the protection of the health and safety of the public.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Statewide organizations representing all parties having an interest in the practice of applied behavior analysis, including the State Board for Applied Behavior Analysis, behavior analyst and behavior analyst assistant professional associations, psychological professional associations (because applied behavior analysis is encompassed in the practice of psychology), and applied behavior analysis educators, which include members who have experience in a small business environment, were consulted and provided input into the development of the proposed rule and their comments were considered in its development.

#### *Rural Area Flexibility Analysis*

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule will apply to all individuals seeking licensure as licensed behavior analysts or certification as a certified behavior analyst assistant and to higher education institutions that seek to register behavior analyst and/or behavior analyst assistant education programs with the State Education Department, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

##### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

As required by Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which both became effective July 1, 2014 (with the exception of the grandfathering provisions set forth below), the proposed rule establishes the new profession of applied behavior analysis and the requirements for licensure as a licensed behavior analyst and certification as a certified behavior analyst assistant which include, but are not limited

to, professional education, experience, examination and limited permit requirements and reiterates the exemptions to the practice of applied behavior analysis set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014. Chapter 8 amended Chapter 554 to make changes necessary to the implementation of Chapter 554.

Chapter 554 of the Laws of 2013 also provides a grandparenting licensure/certification pathway, which the State Education Department is referring to as Pathway One, for individuals who are certified or registered by a national certifying body and submit an attestation of moral character and an application to the State Education Department within two years of the January 10, 2014 effective date of this provision of the statute. Although Pathway One will expire on January 9, 2016, the licenses and certifications issued under it will not.

The proposed amendment to section 29.2 of the Rules of the Board of Regents and section 59.14 of the Regulations of the Commissioner of Education and addition of sections 52.44, 52.45 and Subparts 79-17 and 79-18 of the Regulations of the Commissioner of Education implement the licensure requirements for licensed behavior analysts and the certification requirements for certified behavior analyst assistants of Chapter 554.

The proposed amendment to subdivisions (a) and (b) of section 29.2 of the Rules of the Board of Regents adds the profession of applied behavior analysis to the list of health care professions that are subject to its unprofessional conduct provisions.

The proposed amendment to section 52.44 of the Regulations of the Commissioner of Education establishes the program registration requirements for licensed behavior analyst education programs. These requirements include registration and curriculum requirements for programs offered in New York State that lead to licensure as a licensed behavior analyst. The proposed amendment requires licensed behavior analyst education programs to be a program in applied behavior analysis leading to a master's degree or higher degree, which must require at least one year of full-time study or the equivalent; or a program in applied behavior analysis leading to an advanced certificate which ensures that each student holds a master's or higher degree in subject areas, including, but not limited to, psychology, education or other subject areas that address learning and behavioral change as determined by the Department.

The proposed amendment to section 52.45 of the Regulations of the Commissioner of Education establishes the requirements for certified behavior analyst assistant education programs. These requirements include registration and curriculum requirements for programs offered in New York State that lead to certification as a certified behavior analyst assistant. The proposed amendment requires certified behavior analyst assistant education programs to be a program in applied behavior analysis leading to a bachelor's or higher degree; or a program in applied behavior analysis leading to a certificate which ensures that each student holds a bachelor's degree or a higher degree in subject areas, including, but not limited to, psychology, education or other subject areas that address learning and behavioral change as determined by the Department.

The proposed amendment to paragraph (1) of subdivision (a) of section 59.14 of the Regulations of the Commissioner of Education implements that portion of Chapter 554 of the Laws of 2013 which includes applied behavior analysis among the professions for which a waiver of certain corporate practice restrictions is available.

Additionally, the proposed addition of Subpart 79-17 of the Regulations of the Commissioner of Education establishes the requirements for licensure as a licensed behavior analyst, which include, but are not limited to, professional education, experience, examination and limited permit requirements and reiterates the exemptions to the practice of applied behavior analysis set forth in Education Law section 8807, as added by Chapter 554 and Chapter 8.

The proposed addition of Subpart 79-18 of the Regulations of the Commissioner of Education establishes the requirements for certification as a certified behavior analyst assistant, which include, but are not limited to, professional education, experience, examination and limited permit requirements and reiterates the exemptions to the practice of applied behavior analysis set forth in Education Law section 8807, as added by Chapter 554 and Chapter 8.

The proposed rule will not require any higher education institution to offer an education program that leads to licensure for behavior analysts and/or certification for behavior analyst assistants. The proposed rule will not impose any reporting, recordkeeping or other compliance requirements on higher education institutions in rural areas, unless they seek to register a behavior analyst and/or a behavior analyst assistant education program(s) with the Department. Such higher education institutions will have reporting and record keeping obligations related to the development and maintenance of their behavior analyst and/or behavior analyst assistant education programs, as well as the registration of such programs with the Department.

Individuals seeking licensure to practice in New York State will be

required to submit an application to the State Education Department and meet all the requirements for licensure, which include, but are not limited to, the professional study, experience and examination requirements specified in the proposed rule. Individuals seeking to work in New York State after completing all requirements for licensure except the examination and/or experience requirements will be required to submit a limited permit application to the State Education Department.

The proposed rule will not impose any additional professional service requirements on entities in rural areas.

### 3. COSTS:

With respect to individuals seeking licensure as a licensed behavior analyst or certification as a certified behavior analyst assistant from the State Education Department, including those in rural areas, the proposed rule does not impose any additional costs beyond those required by statute. As required by Education Law section 8804(1)(g), applicants for certification as a certified behavior analyst assistant must pay a fee to the Department of \$150 for their initial license and a triennial registration fee of \$75. Additionally, as required by Education Law section 8804(2)(g), applicants for licensure as a licensed behavior analyst must pay a fee to the State Education Department of \$200 for their initial license and a triennial registration fee of \$100.

Moreover, after the expiration Pathway One on January 9, 2016, applicants for licensure as a licensed behavior analyst will incur the cost of a master's degree-level or higher degree-level education and applicants for certification as a certified behavior analyst assistant will incur the cost of a bachelor's degree-level or higher degree-level education.

The proposed rule will not require higher education institutions to offer education programs that prepare individuals for licensure as a licensed behavior analyst or certification as a certified behavior analyst assistant. However, higher education institutions that seek to register behavior analyst and/or behavior analyst assistant education programs with the Department, including those in rural areas, may incur costs related to the development and maintenance of such education programs and their registration. It is anticipated that such costs will be minimal because several higher education institutions are already offering courses that would or could, with adjustments, meet the registration requirements for a behavior analyst and/or behavior analyst assistant education programs, and that higher education institutions should be able to use their existing staffs and resources to revise their courses and curricula to meet the licensed behavior analyst and/or certified behavior analyst assistant requirements.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which establish the new profession of applied behavior analysis and the licensure requirements for licensed behavior analysts and certification requirements for certified behavior analyst assistants, which include education, experience, examination, age, moral character and fee requirements. The statutory requirements do not make exceptions for individuals who live or work in rural areas. Nor do they make exceptions for higher education institutions located in rural areas. Thus, the State Education Department has determined that the proposed rule's requirements should apply to all individuals seeking licensure as a licensed behavior analyst or certification as a certified behavior analyst assistant and all higher education institutions seeking to register behavior analyst and/or behavior analyst assistant education programs with the Department, regardless of the geographic location to help insure continuing competency across the State. The Department has also determined that uniform standards for the Department's review of prospective registered behavior analyst and/or behavior analyst assistant education programs are necessary to ensure quality behavior analyst and behavior analyst assistant education in all parts of the State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

### 5. RURAL AREAS OF PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of applied behavior analysis. These organizations included the State Board for Applied Behavior Analysis and behavior analyst and behavioral analyst assistant professional associations, psychological professional associations because applied behavior analysis is encompassed in the practice of psychology and applied behavior analysis educators. These groups have members who live or work or provide applied behavior analysis education in rural areas.

### 6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed rule is necessary to implement the statutory requirements of Chapter 554 of the Laws of 2013 and Chapter 8

of the Laws of 2014, and, therefore, the substantive provisions of the proposed rule cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 16 of the Notice of Emergency Adoption and Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

### Job Impact Statement

The proposed rule is required to implement Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which establish and define the practice of applied behavior analysis. The proposed amendment to subdivisions (a) and (b) of section 29.2 of the Rules of the Board of Regents adds the profession of applied behavior analysis to the list of health care professions that are subject to its unprofessional conduct provisions. The proposed amendments to sections 52.44 and 52.45 of the Regulations of the Commissioner of Education establish the program registration requirements for behavior analyst and behavior analyst assistant education programs. These requirements include registration and curriculum requirements for programs offered in New York State that lead to licensure as a licensed behavior analyst or certification as a certified behavior analyst assistant. The proposed amendment to paragraph (1) of subdivision (a) of section 59.14 of the Regulations of the Commissioner of Education implement that portion of Chapter 554 of the Laws of 2013 which includes applied behavior analysis among the professions for which a waiver of certain corporate practice restrictions is available. The proposed addition of Subparts 79-17 and 79-18 establish the education, experience, examination, age and moral character requirements for applicants seeking licensure as a licensed behavior analyst or certification as a certified behavior analyst from the State Education Department and reiterate the exemptions to the practice of applied behavior analysis set forth in section 8807 of the Education Law, as added by Chapter 554 of the Laws of 2013 and amended by Chapter 8 of the Laws of 2014. It is not anticipated that the proposed rule will increase or decrease the number of jobs to be filled because, among other things, Chapter 554 of the Laws of 2013 provides for a grandparenting licensure/certification pathway, which the State Education Department is referring to as Pathway One, for individuals who are certified or registered by a national certifying body and submit an attestation of moral character and an application to the State Education Department within two years of the January 10, 2014 effective date of this provision of the statute. Although Pathway One will expire on January 9, 2016, the licenses and certifications issued under it will not. Additionally, the proposed additions of Subparts 79-17 and 79-18 of the Regulations of the Commissioner of Education contain special provisions that exempt certain specified individuals from the licensure and certification requirements. Because it is apparent from the nature of the proposed rule that it will not adversely impact the number of jobs or employment opportunities, a job impact statement is not required and one has not been prepared.

## NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

### New York State Common Core Learning Standards (CCLS) in Mathematics

**I.D. No.** EDU-48-14-00007-ERP

**Filing No.** 1061

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action Taken:** Amendment of section 100.5(g)(1)(ii)(a) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** The proposed rule is necessary to implement Regents policy to provide additional flexibility

in the transition to the Common Core Regents Examination in Algebra I by allowing, at the local school district's discretion, an additional opportunity for certain specified students to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (Common Core) at the June 2015 test administration, and meet the mathematics requirement for graduation by passing either examination.

The proposed rule was adopted by emergency action at the November 17-18, 2014 Regents meeting, effective November 18, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on December 3, 2014. Subsequently, the proposed rule has been revised to clarify, consistent with the intent of the Regents, to provide this additional flexibility only for students who began Algebra I (Common Core) instruction prior to the current school year, so as to provide the same flexibility for students enrolled in four-semester "stretch" courses as had previously been available to students enrolled in two-semester courses or three-semester "stretch" courses.

Emergency action to adopt the proposed rule is necessary now for the preservation of the general welfare to immediately repeal the November emergency rule and adopt the revised proposed rule for purposes of clarifying the student cohort to which the proposed rule applies, and thereby ensure that school districts and affected students are given sufficient notice to prepare for and timely implement in the 2014-2015 school year the provision providing, at the local school district's discretion, an additional opportunity for students receiving Algebra I (Common Core) instruction that began prior to September 2014, to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (Common Core) at the June 2015 test administration, and meet the math requirement for graduation by passing either examination.

It is anticipated that the emergency rule adopted at the December 15-16, 2014 Regents meeting will be presented to the Board of Regents for adoption as a permanent rule at the February 8-9, 2015 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period mandated by the State Administrative Procedure Act for revised proposed rulemakings.

**Subject:** New York State Common Core Learning Standards (CCLS) in mathematics.

**Purpose:** To provide additional flexibility in the transition to the Common Core-Aligned Regents Examination in Algebra I.

**Text of emergency/revised rule:** 1. The emergency rule amending clause (a) of subparagraph (ii) of paragraph (1) of subdivision (g) of section 100.5 of the Regulations of the Commissioner of Education, that was adopted at the November 17-18, 2014 meeting of the Board of Regents, is repealed, effective December 16, 2014.

2. Clause (a) of subparagraph (ii) of paragraph (1) of subdivision (g) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective December 16, 2014, as follows:

(a) Students who first begin instruction in a commencement level mathematics course aligned to the Common Core Learning Standards in September 2013 and thereafter shall meet the mathematics requirement for graduation in clause (a)(5)(i)(b) of this section by passing a commencement level Regents examination in mathematics that measures the Common Core Learning Standards, or an approved alternative pursuant to section 100.2(f) of this Part; provided that:

(1)(i) for the June 2014, August 2014 and January 2015 administrations only, students receiving algebra I (common core) instruction may, at the discretion of the applicable school district, take the Regents examination in integrated algebra in addition to the Regents examination in algebra I (common core), and may meet the mathematics requirement for graduation in clause (a)(5)(i)(b) of this section by passing either examination; and

(ii) for the June 2015 administration only, students receiving algebra I (common core) instruction that began prior to September 2014 may, at the discretion of the applicable school district, take the Regents examination in integrated algebra in addition to the Regents examination in algebra I (common core) and may meet the mathematics requirement for graduation in clause (a)(5)(i)(b) of this section by passing either examination; and

(2) . . .

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on December 3, 2014, I.D. No. EDU-48-14-00007-EP. The emergency rule will expire February 13, 2015.

**Emergency rule compared with proposed rule:** Substantial revisions were made in section 100.5(g)(1).

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Data, views or arguments may be submitted to:** Ken Wagner, Deputy

Commissioner, Office of Curriculum, Assessment and Educational Technology, EBA Room 875, 89 Washington Ave., Albany, NY 12234, (518) 474-5915, email: NYSEDPI2@nysed.gov

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on December 3, 2014, the proposed rule has been substantially revised as follows.

Based on field feedback, an emergency regulation was adopted by the Board of Regents at their November 2014 meeting to extend through the June 2015 test administration the option, at local discretion, to permit students enrolled in high school courses and receiving instruction aligned to the Common Core Algebra standards to take the Integrated Algebra Regents Examination in addition to the Common Core Algebra I Regents Exam and meet the math requirement for graduation by passing either examination.

The proposed revised emergency regulation clarifies the intent to provide this additional flexibility only for students who began Algebra I (Common Core) instruction prior to the current school year, so as to provide the same flexibility for students enrolled in four-semester "stretch" courses as had previously been available to students enrolled in two-semester courses or three-semester "stretch" courses.

Specifically, clause (a) of subparagraph (ii) of paragraph (1) of subdivision (g) of section 100.5 of the Commissioner's Regulations has been revised to clarify that for the June 2015 administration only, students receiving Algebra I (Common Core) instruction that began prior to September 2014 may, at the discretion of the applicable school district, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core) and may meet the mathematics requirement for graduation by passing either examination.

The above revision requires that the Needs and Benefits, Costs, Local Government Mandates, and Compliance Schedule sections in the previously published Regulatory Impact Statement be revised to read as follows.

#### 3. NEEDS AND BENEFITS:

The proposed amendment provides additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination.

The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. The transition plan for the new Regents Exams in Math (Common Core) includes the following:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding Regents Examinations aligned to the Mathematics Core Curriculum (Revised 2005), while those examinations are still being offered. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and may meet the Mathematics graduation requirement by passing either exam.

The proposed amendment would extend to the June 2015 test administration, at the discretion of the local school district, the option for students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and meeting the Mathematics graduation requirement by passing either exam.

#### 4. COSTS:

- (a) Costs to State government: none.
- (b) Costs to local government: none.
- (c) Costs to private regulated parties: none.
- (d) Costs to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment does not impose any direct costs to the State,

school districts, charter schools or the State Education Department. The proposed amendment provides additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment would extend to the June 2015 test administration, at the discretion of the local school district, the option for students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and meeting the Mathematics graduation requirement by passing either exam.

#### 10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement requirements for transitioning to Common Core mathematics examinations, and does not impose any additional compliance requirements or costs on school districts or charter schools. It is anticipated regulated parties will be able to achieve compliance with the rule by its effective date. The proposed amendment would extend to the June 2015 test administration, at the discretion of the local school district, the option for students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and meeting the Mathematics graduation requirement by passing either exam. Whether or not to offer such option is within the discretion of each school district.

#### *Revised Regulatory Flexibility Analysis*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on December 3, 2014, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision requires that the Compliance Requirements, Compliance Costs and Minimizing Adverse Impact sections in the previously published Regulatory Flexibility Analysis be revised to read as follows.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on school districts or charter schools. The proposed amendment would extend to the June 2015 test administration, at the discretion of the applicable school district, the option for students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and meeting the Mathematics graduation requirement by passing either exam. Whether or not to offer such option is within the discretion of each school district or eligible charter school.

#### 4. COMPLIANCE COSTS:

The proposed amendment does not impose any direct costs to school districts or charter schools. The proposed amendment provides additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination. Whether or not to offer such option is within the discretion of each school district or eligible charter school. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not directly impose any additional compliance requirements or costs to school districts and charter schools. The proposed amendment is necessary to implement Regents policy to provide additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination. Whether or not to offer such option is within the discretion of each school district or eligible charter school. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

#### *Revised Rural Area Flexibility Analysis*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on December 3, 2014, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision requires that the Reporting, Recordkeeping and Other Compliance Requirements, Compliance Costs, and Minimizing Adverse Impact sections in the previously published Rural Area Flexibility Analysis be revised to read as follows.

#### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional compliance requirements on school districts or charter schools located in rural areas. The proposed amendment would extend to the June 2015 test administration, at the discretion of the applicable school district, the option for students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and meeting the Mathematics graduation requirement by passing either exam. Whether or not to offer such option is within the discretion of each school district or eligible charter school.

The proposed amendment does not impose any additional professional services requirements.

#### 3. COMPLIANCE COSTS:

The proposed amendment provides additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination. Whether or not to offer such option is within the discretion of each school district or eligible charter school. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

The proposed amendment does not impose any direct costs to school districts or charter schools located in rural areas.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not directly impose any additional compliance requirements or costs to school districts and charter schools located in rural areas. The proposed amendment is necessary to implement Regents policy to provide additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination.

Because the Regents policy upon which the proposed amendment is based applies to all school districts in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt school districts or charter schools from coverage by the proposed amendment. The proposed amendment does not directly impose any additional compliance requirements or costs on school districts or charter schools. Whether or not to offer such option is within the discretion of each school district or eligible charter school. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

#### *Revised Job Impact Statement*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on December 3, 2014, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revised proposed amendment provides additional flexibility in the transition to the Common Core-aligned Regents Examination in Algebra I by allowing, at the discretion of the local school district, students receiving Algebra I (common core) instruction that began prior to September 2014 to take the Regents Examination in Integrated Algebra in addition to the Regents examination in Algebra I (common core) at the June 2015 test administration, and meet the requirement for graduation by passing either examination.

The revised proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Nurse Practitioner Collaborative Relationships**

**I.D. No.** EDU-36-14-00002-A

**Filing No.** 1057

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 29.14 and 64.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6509(9) and 6902(3); L. 2014, ch. 56, part D

**Subject:** Nurse Practitioner Collaborative Relationships.

**Purpose:** To implement part D of chapter 56 of the Laws of 2014.

**Text of final rule:** 1. Subdivision (a) of section 29.14 of the Rules of the Board of Regents is amended, effective January 1, 2015, to read as follows:

(a) Unprofessional conduct in the practice of nursing shall include all conduct prohibited by sections 29.1 and 29.2 of this Part, except as provided in this section, and shall also include the following:

(1) ...

(2) ...

(3) *Failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician of paragraph (a) of subdivision (3) of section 6902 of the Education Law or the collaborative relationships requirements of paragraph (b) of subdivision (3) of section 6902 of the Education Law.*

2. Subdivision (g) of section 64.5 of the Regulations of the Commissioner of Education is added, effective January 1, 2015, to read as follows:

(g) *Collaborative relationships.*

(1) *Definitions. As used in this subdivision:*

(i) *Collaborative relationships shall mean that a nurse practitioner communicates, in person, by telephone, or through written means including electronically, with a physician who is qualified to collaborate in the specialty involved, or in the case of a hospital, the nurse practitioner communicates with a physician qualified to collaborate in the specialty involved and who has privileges at such hospital, for the purposes of exchanging information, as needed, in order to provide comprehensive patient care and to make referrals, as necessary.*

(ii) *Physician shall mean a New York State licensed and registered physician.*

(iii) *Hospital shall mean a hospital as defined by Public Health Law section 2801(1).*

(2) *Notwithstanding any provision in this section to the contrary and insofar as authorized by Education Law section 6902(3)(b), in lieu of complying with the requirements relating to collaboration with a physician, collaborative practice agreements and practice protocols as set forth in subdivisions (a), (b), (c), (d) and (e) of this section, a nurse practitioner may have collaborative relationships, with one or more physicians or a hospital, as such terms are defined in paragraph (1) of this subdivision, provided that the following criteria are met:*

(i) *The nurse practitioner shall have more than three thousand six hundred hours of experience practicing as a licensed or certified nurse practitioner pursuant to the laws of New York or any other state or as a nurse practitioner while employed by the United States Veterans Administration, the United States Armed Forces or the United States Public Health Service.*

(ii) *The nurse practitioner shall complete and maintain a form, prescribed by the department, to which the nurse practitioner shall attest, that describes the nurse practitioner's current collaborative relationships. The nurse practitioner shall also acknowledge on the form that if reasonable efforts to resolve any dispute that may arise with the collaborating physician, or, in the case of a collaboration with a hospital, with a physician qualified to collaborate in the specialty involved and having professional privileges at such hospital, about a patient's care are not successful, the recommendation of the physician shall prevail. The form shall be updated as needed and may be subject to review by the department, upon its request.*

(iii) *In addition to the form required by subparagraph (ii) of this paragraph, the nurse practitioner shall maintain documentation in written or electronic form that supports his or her collaborative relationships.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 64.5(g)(1)(i) and (2)(ii).

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Revised Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, nonsubstantial revisions were made to the proposed regulation, as follows:

In subparagraph (i) of paragraph (1) of subdivision (g) of section 64.5, the term "specialty area involved" was replaced with the term "specialty involved" because the term "specialty involved" is the term used in the statute. This revision was made for the purpose of clarifying the text of the proposed regulation and to conform the proposed regulation to the statute.

In subparagraph (ii) of paragraph (2) of subdivision (g) of section 64.5, the term "specialty area involved" was replaced with the term "specialty involved" because the term "specialty involved" is the term used in the statute. This revision was made for the purpose of clarifying the text of the proposed regulation and to conform the proposed regulation to the statute.

The above nonsubstantial revisions do not require any changes to the previously published Regulatory Impact Statement.

**Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, nonsubstantial revisions were made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revisions do not require any changes to the previously published Regulatory Flexibility Analysis.

**Revised Rural Area Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, nonsubstantial revisions were made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revisions require that the Reporting, Record-keeping and Other Compliance Requirements; and Professional Services section of the previously published Rural Area Flexibility Analysis be revised to read as follows:

**2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

The proposed rule is necessary to conform the Rules of the Board of Regents and the Commissioner's Regulations with Education Law section 6902 as amended by Part D of Chapter 56 of the Laws of 2014, which will become effective January 1, 2015. The proposed rule will allow certain experienced nurse practitioners to practice with more autonomy, pursuant to collaborative relationships with one or more physicians or a hospital. The proposed rule establishes several record keeping and documentation requirements for nurse practitioners practicing pursuant to collaborative relationships, as well as specific unprofessional conduct provisions for all nurse practitioners.

The proposed addition of paragraph (3) to subdivision (a) of section 29.14 of the Rules of the Board of Regents establishes that unprofessional conduct in the practice of nursing includes the failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician as set forth in Education Law § 6902(3)(a) or the collaborative relationships requirements of Education Law § 6902(3)(b).

The proposed addition of subdivision (g) to section 64.5 of the Regulations of the Commissioner of Education establishes criteria for authorizing qualified nurse practitioners to practice, pursuant to collaborative relationships with one or more licensed physicians or an Article 28 hospital, in lieu of complying with the requirements relating to collaboration with a physician, collaborative practice agreements and protocols. The proposed rule requires that nurse practitioners seeking to practice, pursuant to collaborative relationships, must have more than 3,600 hours of qualifying experience.

The proposed rule further requires nurse practitioners, under collaborative relationships, to complete and maintain a form, prescribed by the Department, to which they must attest, that describes their current collaborative relationships, which must be updated as needed and may be subject to review by the Department, upon its request. The proposed rule also requires nurse practitioners to acknowledge on the aforementioned form that if reasonable efforts to resolve any disputes that may arise with the collaborating physician, or, in the case of a collaboration with a hospital, with a physician qualified to collaborate in the specialty involved and having professional privileges at such hospital, about a patient's care are not successful, the recommendation of the physician shall prevail.

In addition, to above-referenced form, the proposed rule requires nurse practitioners to maintain documentation in written or electronic form that supports their collaborative relationships.

The proposed rule will not impose any additional professional services requirements on entities in rural areas.

**Revised Job Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, nonsubstantial revisions were made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The revised proposed rule is necessary to implement the requirements of subdivision (3) of section 6902 of the Education Law, as amended by Part D of Chapter 56 of the Laws of 2014, by establishing criteria for authorizing nurse practitioners to practice, pursuant to collaborative relationships with one or more licensed physicians qualified to collaborate in the specialty involved or a hospital licensed under Article 28 of the Public Health Law, that provides services through licensed physicians qualified to collaborate in the specialty involved and having privileges at such institution, in lieu of practicing in collaboration with a physician in accordance with a written practice agreement and written practice protocols.

The revised proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised proposed rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

**Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the September 10, 2014 State Register, the Department received the following comments:

**1. COMMENT:**

A nursing organization expressed support for the proposed regulations and commended the Department's diligent efforts to date. The commenter noted the history, education and training of nurse practitioners, as well as prior legislation that established scope of practice for nurse practitioners. The commenter further stated that over the years, it has become clear that a signed written practice agreement was an impediment to a nurse practitioner's ability to practice.

The commenter stated that the proposed regulations clearly define "collaborative relationships" in a manner that is consistent with the new law and appropriately clarify which nurse practitioners are eligible to practice pursuant to a collaborative relationship in lieu of practicing in collaboration with a physician pursuant to a written practice agreement and written practice protocols. The commenter also stated that the proposed regulations provide additional detail about what documentation a nurse practitioner must maintain as evidence of compliance with the new collaborative relationship standard and restates that failure to comply with either this new standard or with the standard of practicing in collaboration with a physician pursuant to a written practice agreement and written practice protocols, constitutes professional misconduct.

The commenter stated that the proposed regulations aptly reference the statutory requirement that a nurse practitioner "complete and maintain a form, created by the department, that describes. . . current collaborative relationships," and addresses issues pertaining to dispute resolution. The commenter further stated that it looks forward to continuing to work with the Department to develop the form.

**DEPARTMENT RESPONSE:**

The Department appreciates the support as it works to both protect the public and provide greater access to health care for New Yorkers.

**2. COMMENT:**

Another nursing organization expressed support for the proposed regulations because it supports the principle of amending the collaborative agreement regulations to ensure access to care for New Yorkers and the proposed regulations are consistent with statute.

The commenter also noted the history, education, and experience of nurse practitioners.

The commenter further stated that, although it would prefer an earlier working draft of the regulations because it believes that they provided greater clarity, it acknowledged that the revision to allow attestation of an agreement with a physician/physicians or health care agency by the "experienced" nurse practitioner is a more practical approach.

**DEPARTMENT RESPONSE:**

The Department appreciates the support as it works to both protect the public and provide greater access to health care for New Yorkers.

**3. COMMENT:**

One commenter, on behalf of several medical organizations, objected to

language that would permit a nurse practitioner to have collaborative relationships with one or more physicians who are qualified to collaborate in the "specialty area involved". The commenter noted that Education Law § 6902(3)(b) requires a nurse practitioner to have collaborative relationships with one or more physicians qualified to collaborate in the "specialty involved." The commenter claimed that collaboration in the "specialty area involved" in the proposed regulations is much broader than collaboration in the "specialty involved" in statute. The commenter further stated that: (1) a nurse practitioner practicing family medicine or a community health nurse practitioner should not be permitted to collaborate with a gastroenterologist; (2) an acute care nurse practitioner should not be allowed to collaborate with an anesthesiologist; and (3) a psychiatric nurse practitioner should not be allowed to collaborate with a non-psychiatrist.

**DEPARTMENT RESPONSE:**

The Department disagrees with the commenter's interpretation of Education Law § 6902(3)(b) and the proposed regulation as it would prohibit a nurse practitioner from collaborating with physicians who practice outside of the specialty area of practice of the nurse practitioner, which would undermine the nurse practitioner's ability to provide well-coordinated quality health care. However, since publication of the proposed rule, non-substantial revisions were made as follows:

In sections 64.5(g)(1)(i) and 64.5(g)(2)(ii), the term "specialty area involved" was replaced with the term "specialty involved" because the term "specialty involved" is the term used in the statute.

These changes were made to clarify the proposed regulation and conform it to statute. These nonsubstantial changes will have no impact on the Department's interpretation of statute or regulation.

**4. COMMENT:**

One commenter, on behalf of several medical organizations, indicated that the definition of "collaborative relationship" in Education Law § 6902(3)(b), needs extensive clarification in the proposed regulations. The commenter stated that greater specificity is needed as to what is meant by "exchanging information" and "to provide comprehensive patient care."

**DEPARTMENT RESPONSE:**

Education Law § 6902(3)(b) defines "collaborative relationships" as when a nurse practitioner communicates with a physician qualified to collaborate in the specialty involved for the purpose of exchanging information to provide comprehensive patient care and to make referrals, as necessary. The proposed regulatory language is identical to the statute except that it states that physicians must be "qualified to collaborate in the specialty area involved". The Department believes that the proposed definition as either originally drafted or revised to remove references to the word "area" is sufficiently clear and references to "exchanging information" and "comprehensive patient care" are not vague. However, since publication of the proposed rule, non-substantial revisions were made to replace "specialty area involved" with "specialty involved" because "specialty involved" is used in statute. These nonsubstantial changes were made for the purposes of clarifying the proposed regulation and conforming it to statute.

The Department disagrees with the commenter's position that greater specificity is needed as to what is meant by "exchanging information" and "to provide comprehensive patient care", as those terms are used in the statutory definition of "collaborative relationship." Therefore, no changes are necessary. However, the commenter's suggestions are noted and may be addressed in future guidance.

**5. COMMENT:**

One commenter, on behalf of several medical organizations, claimed that the proposed regulation would allow a nurse practitioner from any other state or a nurse practitioner employed by the U.S. Veterans Administration, U.S. Armed Forces or U.S. Public Health Service to practice in a collaborative relationship with a physician without a written practice agreement. The commenter stated that Education Law § 6902(3)(b) requires nurse practitioners to be certified under Education Law § 6910 and have practiced for more than 3,600 hours (as a nurse practitioner certified in New York State). The commenter recommended deleting references to other states, the U.S. Veterans Administration, U.S. Armed Forces and U.S. Public Health Service to make the proposed regulations consistent with the implementing statute.

**DEPARTMENT RESPONSE:**

Education Law § 6902(3)(b) will allow a New York State certified nurse practitioner who has been "practicing for more than three thousand six hundred hours" to practice and have collaborative relationships in lieu of practicing pursuant to a written practice agreement with a collaborating physician (if the nurse practitioner meets additional criteria in statute). To implement this statutory provision, the proposed regulations would allow a New York State certified nurse practitioner to meet the 3,600 hour experience requirement by practicing as a licensed or certified nurse practitioner pursuant to the laws of New York or another state or practicing as a

nurse practitioner while employed by the U.S. Veterans Administration, U.S. Armed Forces or U.S. Public Health Service. The Department disagrees with the commenter's interpretation of the law and the proposed regulations. The proposed regulations would not allow nurse practitioners to practice in New York State unless they are New York State certified nurse practitioners. The Department believes that it is a reasonable interpretation of the implementing statute to allow a New York State certified nurse practitioner to meet the 3,600 hour experience requirement by practicing as a licensed or certified nurse practitioner pursuant to the laws of New York or another state or practicing as a nurse practitioner while employed by the U.S. Veterans Administration, U.S. Armed Forces or U.S. Public Health Service. Furthermore, the proposed regulations are consistent with New York's policy of not imposing barriers to professional practice in New York by members of the U.S. Armed Forces, their families or veterans.

6. COMMENT:

One commenter, on behalf of several medical organizations, noted that while Education Law § 6902(3)(b) requires nurse practitioners to "complete and maintain a form, created by the department ... that describes [their] collaborative relationships," the proposed regulation fails to illuminate as to what information should be included on the form. The commenter urged the addition of relevant details to help describe a collaborative relationship. The commenter also urged the addition of a provision that would require nurse practitioners to update the form relating to collaborative relationships "with each nurse practitioner re-registration".

DEPARTMENT RESPONSE:

The Department prefers to have flexibility in the future to revise the form without having to amend regulations. The Department also believes that it is unnecessary to include content requirements for the form in regulation beyond what is explicitly required by statute. However, the commenter's suggestions about what types of information should be included in the form are noted and will be considered as the Department develops the form.

The statute does not explicitly authorize the Department to require a nurse practitioner to update the form when registering with the Department. The Department believes the requirement that a nurse practitioner ensure the form is up-to-date, is reasonable. Therefore, no changes are necessary.

7. COMMENT:

One commenter, on behalf of several medical organizations, recommended that the proposed regulations denote the obligations of the nurse practitioner to his or her patients when a collaborative relationship with a physician is terminated.

DEPARTMENT RESPONSE:

The Education Law and Commissioner's Regulations currently require a nurse practitioner to practice pursuant to a written practice agreement with a collaborating physician. In cases where a written practice agreement terminates, the nurse practitioner is legally required to enter into another written practice agreement with a collaborating physician to continue practicing. Current laws, regulations, and Department guidance do not explicitly impose any other specific obligations on a nurse practitioner with respect to their patients when a practice agreement terminates.

Similarly, newly enacted Education Law § 6902(3)(b) does not require the Commissioner to specify the obligations imposed on a nurse practitioner, such as informing his or her patients, when a collaborative relationship with a physician is terminated. This law defines "collaborative relationships" as when a nurse practitioner communicates with a physician for the purpose of exchanging information to provide comprehensive patient care and to make referrals, as necessary. Nurse practitioners are authorized to have collaborative relationships with multiple physicians and these relationships may start and end without any disruption in the nurse practitioner's practice or any harm to patients. The Department believes that it would be impractical to impose specific obligations on nurse practitioners, such as contacting all of their patients each time a collaborative relationship with a physician terminates; moreover, it also would not have an impact on the quality of care that a nurse practitioner provides to patients. Nevertheless, the Department will take the comment under advisement and may consider issuing guidance should the need arise.

8. COMMENT:

"While the statute specifically states that the failure to comply with the requirements found in this paragraph [Education Law § 6902(3)(b)] by a nurse practitioner who is not complying with such provisions of paragraph (a) of Sec. 6902 shall be subject to professional misconduct provisions set forth in article one hundred thirty of this article, the proposed regulation fails to amend 8 NYCRR Part 29.14 to add a subsection (3) making it professional misconduct for a nurse practitioner who fails to adhere to the requirements of Section 6902(3)(b) of the Education Law subject to professional misconduct."

DEPARTMENT RESPONSE:

The Department disagrees with this reading of the proposed regulation. The proposed addition of paragraph (3) to subdivision (a) of § 29.14 of the Regents' Rules establishes that unprofessional conduct in the practice of nursing includes the failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician in Education Law § 6902(3)(a) or the collaborative relationships requirements of Education Law § 6902(3)(b).

## NOTICE OF ADOPTION

### Dental Hygiene Collaborative Arrangements

**I.D. No.** EDU-36-14-00004-A

**Filing No.** 1058

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 61.9 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6606(1), (2), 6608 and 6611(10); L. 2013, ch. 239

**Subject:** Dental Hygiene Collaborative Arrangements.

**Purpose:** To implement chapter 239 of the Laws of 2013.

**Text of final rule:** 1. The introductory paragraph of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

The practice of dental hygiene, in accordance with section 6606 of the Education Law, shall be performed *either* under the supervision of a licensed dentist *or pursuant to a collaborative arrangement as defined in subdivision (f) of this section.*

2. Subdivision (b) of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

(b) The following services may be performed under the general supervision of a licensed dentist:

- (1) . . .
- (2) . . .
- (3) . . .
- (4) providing patient education *and counseling relating to the improvement of oral health;*
- (5) [placing and exposing X-ray films] *taking and exposing dental radiographs;*
- (6) . . .
- (7) . . .
- (8) taking *and assessing* medical history including the measuring and recording of vital signs *as an aid to diagnosis by the dentist and to assist the dental hygienist in providing dental hygiene services;*
- (9) [charting caries and] *performing dental and/or periodontal [conditions] assessments as an aid to diagnosis by the dentist and to assist the dental hygienist in providing dental hygiene services;*
- (10) applying pit and fissure sealants; [and]
- (11) applying desensitizing agents to the teeth[.];
- (12) *placing and removing temporary restorations;*
- (13) *making assessments of the oral and maxillofacial area as an aid to diagnosis by the dentist;*
- (14) *taking impressions for study casts. Study casts shall mean only such casts as will be used for purposes of diagnosis and treatment planning by the dentist and for the purposes of patient education; and*
- (15) *providing dental health care case management and care coordination services, which shall include, but not be limited to:*

- (i) *community outreach;*
- (ii) *improving oral health outcomes;*
- (iii) *improving access to dental care by assisting people in establishing an ongoing relationship with a dentist, in order to promote the comprehensive, continuous and coordinated delivery of all aspects of oral health care; and*
- (iv) *assisting people to obtain dental health care.*

3. Subdivision (c) of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

(c) The following services may be performed only under the personal supervision of a licensed dentist:

- (1) . . .
- (2) . . .
- [3] *taking impressions for study casts. Study casts shall mean only such casts as will be used for purposes of diagnosis and treatment planning by the dentist and for the purposes of patient education.]*

- [(4)] (3) placing or removing matrix bands;
- [(5)] (4) applying a topical medication not related to a complete dental prophylaxis;
- [(6)] (5) placing and removing periodontal dressings;
- [(7)] (6) selecting and prefitting provisional crowns;
- [(8)] (7) selecting and prefitting orthodontic bands;
- [(9)] (8) removing orthodontic arch wires and ligature ties;
- [(10)] (9) taking impressions for space maintainers, orthodontic appliances, and occlusal guards;
- [(11)] (10) placing and removing temporary separating devices; and
- [(12)] (11) placing orthodontic ligatures.

4. Subdivision (e) of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

(e) In accordance with section 29.1(b)(9) and (10) of this Title, a licensed dental hygienist performing services under the supervision of a licensed dentist or pursuant to a collaborative arrangement as defined in subdivision (f) of this section is not permitted to provide dental services or dental supportive services that the licensed dental hygienist knows or has reason to know that he or she is not competent to perform, and a licensed dentist is not permitted to delegate to a licensed dental hygienist dental services or dental supportive services that the licensed dentist knows or has reason to know that the licensed dental hygienist is not qualified by training, experience or by licensure to perform.

5. Subdivision (f) of section 61.9 of the Regulations of the Commissioner of Education is added, effective January 1, 2015, to read as follows:

(f) Collaborative arrangement.

(1) Definitions. As used in this subdivision:

(i) Collaborative arrangement shall mean an agreement between a registered dental hygienist working for a hospital and a licensed and registered dentist who has a formal relationship with the same hospital.

(ii) Hospital shall mean a hospital as defined by Public Health Law section 2801(1).

(2) Requirements. A registered dental hygienist providing services pursuant to a collaborative arrangement shall:

(i) only provide those services that may be provided under general supervision as specified in subdivision (b) of this section, provided that the physical presence of the collaborating dentist is not required for the provision of such services;

(ii) instruct individuals to visit a licensed dentist for comprehensive examination or treatment;

(iii) possess and maintain certification in cardiopulmonary resuscitation in accordance with the requirements for dentists set forth in section 61.19 of this Part and the following:

(a) At the time of his or her registration renewal, the dental hygienist shall attest to having met the cardiopulmonary resuscitation requirement or attest to meeting the requirements for exemption as defined in clause (b) of this subparagraph.

(b) A dental hygienist may be granted an exemption to the cardiopulmonary resuscitation requirement if he or she is physically incapable of complying with the requirements of this subparagraph. Documentation of such incapacity shall include a written statement by a licensed physician describing the dental hygienist's physical incapacity. The dental hygienist shall also submit an application to the department for exemption which verifies that another individual will maintain certification and be present at the location where the dental hygienist provides dental hygiene services, pursuant to a collaborative arrangement, while the dental hygienist is treating patients.

(c) Each dental hygienist shall maintain for review by the department records of compliance with the cardiopulmonary resuscitation certification requirement, including the dental hygienist's cardiopulmonary resuscitation certification card; and

(iv) provide collaborative services only pursuant to a written agreement that is maintained in the practice setting of the dental hygienist and collaborating dentist. Such written agreement shall include:

(a) provisions for:

(1) referral and consultation;

(2) coverage for emergency absences of either the dental hygienist or collaborating dentist;

(3) resolution of disagreements between the dental hygienist and collaborating dentist regarding matters of treatment, provided that, to the extent a disagreement cannot be resolved, the collaborating dentist's treatment shall prevail;

(4) the periodic review of patient records by the collaborating dentist; and

(5) such other provisions as may be determined by the dental hygienist and collaborating dentist to be appropriate; and

(b) protocols, which may be updated periodically, identifying the services to be performed by the dental hygienist in collaboration with the dentist and reflecting accepted standards of dental hygiene. Protocols shall include provisions for:

(1) case management and care coordination, including treatment;

(2) appropriate recordkeeping by the dental hygienist; and

(3) such other provisions as may be determined by the dental hygienist and collaborating dentist to be appropriate.

(3) Collaborative arrangements shall not supersede any law or regulation which requires identified services to be performed under the personal supervision of a dentist.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 61.9(b)(15)(ii).

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

#### Revised Regulatory Impact Statement

Since the publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, a nonsubstantial revision was made to the proposed regulation, as follows:

In subparagraph (ii) of paragraph (15) of subdivision (b) of section 61.9, the term "improving oral outcomes" was replaced with the term "improving oral health outcomes" in order to clarify the text of the proposed regulation and to correct the inadvertent omission of the word "health" from this term.

The above nonsubstantial revision does not require any changes to the previously published Regulatory Impact Statement.

#### Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Statement in Lieu of Regulatory Flexibility Analysis for Small Businesses and Local Governments.

#### Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Rural Area Flexibility Analysis.

#### Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on September 10, 2014, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Rural Area Flexibility Analysis.

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

#### Assessment of Public Comment

Since the publication of a Notice of Proposed Rule Making in the September 10, 2014 State Register, the State Education Department received the following comments:

1. COMMENT:

One commenter submitted comments in support of the proposed rule on behalf of the nearly 10,000 registered dental hygienists in New York State and the public they serve.

The commenter further stated that "[r]ecognizing the situation of need in New York State concerning limited access to preventive dental hygiene services; the ongoing growth of the profession of dental hygiene over the last century; and the inter-professional collaborative environment ... which the statutory changes bring about, we commend the Board of Regents, through the actions of the State Board for Dentistry and the Committee on Collaborative Practice for the State Board for its commitment to the welfare of NYS residents as evidenced by the regulatory proposal before you."

The commenter also expressed gratitude for the rights and responsibilities bestowed upon dental hygienists in New York State to practice their profession unencumbered by outdated regulations. The commenter reaffirmed its belief that dental hygiene is an autonomous profession with strong inter-personal capabilities and an over 100 year commitment to improved oral health for all New Yorkers.

DEPARTMENT RESPONSE:

The Department appreciates the support as it works to both protect the public and provide greater access to dental care for New Yorkers.

2. COMMENT:

One commenter submitted several comments in support of the proposed rule and summarized some of the ways in which collaborative arrangements can augment services in Article 28 facilities and increase New Yorkers' access to dental care.

The commenter also stated that the statute and the proposed rule will allow the hospital dental center, where she serves as the clinical manager, to deploy highly qualified and skilled dental hygienists to community sites to provide essential preventive care and education to a population that has difficulty accessing dental care because they are either uninsured, underinsured or have public assistance programs that many dental offices in the area will not accept. The commenter further stated that the proposed rule will permit these dental hygienists to follow up with dental procedures either at the community site or at one of her hospital's dental center's two primary sites, and result in improved access to care and a healthier population.

DEPARTMENT RESPONSE:

The Department appreciates the support as it works to both protect the public and provide greater access to dental care for New Yorkers.

3. COMMENT:

One commenter submitted several comments in support of the proposed rule.

The commenter also discussed the educational competencies of the graduate dental hygienist, "in order to rationalize and support" the proposed rule's modification of certain regulatory provisions relating to the supervision of dental hygienists by dentists. The commenter stated that these modifications were necessary in order to better reflect the present educational methodologies, standards and competencies in dental hygiene education, which are required by the American Dental Association's Commission on Dental Accreditation (CODA). The commenter further stated that today's dental hygienists are equipped with the knowledge and skills to provide dental services under collaborative arrangements. The commenter then summarizes some of the educational standard competencies that graduates from CODA accredited dental hygiene programs must meet.

DEPARTMENT RESPONSE:

The Department appreciates the support as it works to both protect the public and provide greater access to dental care for New Yorkers.

**NOTICE OF ADOPTION**

**Academic Intervention Services (AIS)**

**I.D. No.** EDU-39-14-00015-A

**Filing No.** 1055

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 100.2(ee) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

**Subject:** Academic Intervention Services (AIS).

**Purpose:** To establish modified requirements for AIS during the 2014-2015 school year.

**Text or summary was published** in the October 1, 2014 issue of the Register, I.D. No. EDU-39-14-00015-EP.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2017, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Child Abuse Identification and Reporting Coursework or Training for Coaches**

**I.D. No.** EDU-39-14-00016-A

**Filing No.** 1054

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 57-1.1 and 135.4; and addition of section 135.7 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), 803(not subdivided), 3204(2), (3), 3036(1) and (2); and L. 2014, ch. 205

**Subject:** Child abuse identification and reporting coursework or training for coaches.

**Purpose:** To conform Commissioner's Regulations to Education Law section 3036, as added by Chapter 205 of the Laws of 2014.

**Text or summary was published** in the October 1, 2014 issue of the Register, I.D. No. EDU-39-14-00016-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Pupils with Limited English Proficiency**

**I.D. No.** EDU-40-14-00006-A

**Filing No.** 1056

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 154-2.3 and 154-2.4 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 208(not subdivided), 215(not subdivided), 305(1), (2), 2117(1), 2854(1)(b), 3204(2), (2-a), (3) and (6)

**Subject:** Pupils with Limited English Proficiency.

**Purpose:** (i) to enact certain technical amendments;

(ii) amend § 154-2.3(f)(3) to allow parents an additional five days to return to the school district the signed notification form regarding student placement; and

(iii) amend § 154-2.3(k) to permit school districts to apply for an exemption from the professional development requirements addressing the needs of English Language Learners under certain circumstances.

**Text or summary was published** in the October 8, 2014 issue of the Register, I.D. No. EDU-40-14-00006-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is the 4th or 5th year after the

year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

#### **Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the State Register on October 8, 2014, the State Education Department (“the Department”) received the following comments:

##### **1. COMMENT:**

Supports the proposed amendment to sections 154-2.3 (f)(3) and 154-2.3(k) to afford parents ten school days, rather than five school days as originally proposed, to sign and return to the school district the notification form indicating that the parent is either in agreement with the child being placed in a bilingual education program or directs the district to place the child in an English as a new language/English as a second language program.

##### **DEPARTMENT RESPONSE:**

No response is necessary as the comment is supportive.

##### **2. COMMENT:**

Supports the proposed amendment to section 154-2.3(k) to allow, under certain circumstances specified in the regulation, school districts to request a waiver to the requirement that a minimum of 15% of the required professional development clock hours for all teachers and a minimum of 50% of the required professional development clock hours for all bilingual and English as a second language teachers be dedicated to the education of ELLs/bilingual learners.

##### **DEPARTMENT RESPONSE:**

No response is necessary as the comment is supportive.

##### **3. COMMENT:**

Recommends that the professional development requirements established for teachers be extended to clinical/support personnel (e.g., school psychologists, guidance counselors, social workers) who must be prepared to assist in the identification and assessment of, or provide instructional support to, ELLs/bilingual learners with disabilities.

##### **DEPARTMENT RESPONSE:**

The comment is beyond the scope of the proposed rule making, which is only intended to amend section 154-2.3(k) of the Commissioner’s Regulations to allow school districts to request a waiver to the professional development requirements, under certain specified circumstances. The professional development requirements for teachers and administrators in section 154-2.3(k) were adopted at the September 2014 Regents meeting as part of a separate rule making that enacted a new Subpart 154-2 (State Register, October 1, 2014; EDU-27-14-00011-A). However, the Department will consider the comment’s recommendation to extend the professional development requirements to clinical/support personnel for a possible future rulemaking.

## **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

### **Local High School Equivalency Diplomas Based Upon Experimental Programs**

**I.D. No.** EDU-52-14-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 100.8 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2), 309(not subdivided) and 3204(3)

**Subject:** Local high school equivalency diplomas based upon experimental programs.

**Purpose:** To extend until 6/30/17 the provision for awarding local high school equivalency diplomas based upon experimental programs.

**Text of proposed rule:** Section 100.8 of the Regulations of the Commissioner of Education is amended, effective April 1, 2015, as follows:

100.8 Local high school equivalency diploma.

Boards of education specified by the commissioner may award a local high school equivalency diploma based upon experimental programs approved by the commissioner until [June 30, 2015] *June 30, 2017*, after which date such boards may no longer award a local high school equivalency diploma.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Data, views or arguments may be submitted to:** Mark Leinung, Director Adult Education Programs and Policy, Office of Adult Career and Continuing Education Services, EBA Room 460, 89 Washington Ave., Albany, NY 12234, (518) 474-8892, email: Mark.Leinung@nysed.gov

**Public comment will be received until:** 45 days after publication of this notice.

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Board of Regents and the Commissioner to adopt rules and regulations to carry out laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes the State Education Department to alter the subjects of required instruction.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to extend for two years (to June 30, 2017) the existing provision in section 100.8 of the Commissioner’s Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The existing provision will otherwise sunset on June 30, 2015.

##### **3. NEEDS AND BENEFITS:**

The proposed amendment is necessary to implement Regents policy to extend for two years the provision in section 100.8 of the Commissioner’s Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

The extension will allow the continuance in New York State of the National External Diploma Program (NEDP), which is a complete assessment program that allows adults over age 21 to demonstrate and document the lasting outcomes and transferable skills for which a high school diploma is awarded. The NEDP is a competency based, applied performance assessment system which capitalizes on an adult’s life experiences and uses a practical application of learning for assessment through such methods as simulations, authentic demonstration, research projects, hands-on interviews and oral interviews. An NEDP candidate must demonstrate a job skill and the competencies that align with the skills needed to function effectively in the workplace. All competencies require a 100 percent mastery.

The two year extension will ensure that all current NEDP students in the approximately 22 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma.

During this time, and depending on policy and direction from the Regents and the Department’s ACCES Committee, staff intends to develop, through a separate rule making, a proposed amendment to the Commissioner’s Regulations that will provide for multiple pathways to a New York State High School Equivalency Diploma. Under this new procedure, the National External Diploma Program could be established as a New York State High School Equivalency Diploma. These Equivalency Diplomas would be issued by the Department, as opposed to the local high

school equivalency diploma which is issued by local school boards. This will create an additional option and pathway for adult students while phasing out the need and authority for school boards to issue the local high school equivalency diploma.

#### 4. COSTS:

- (a) Costs to State government: None.
- (b) Costs to local government: None.
- (c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment will not impose any costs on the State, local governments, private regulated parties or the State Education Department. It merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. It merely extends for two years an existing provision related to the issuance of a local high school equivalency diploma.

#### 6. PAPERWORK:

The proposed amendment merely extends for two years an existing provision related to the issuance of a local high school equivalency diploma, and does not impose any additional paperwork requirements.

#### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements.

#### 8. ALTERNATIVES:

The proposed amendment is necessary to implement Regents policy to extend for two years (to June 30, 2017) the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner. The existing provision will otherwise sunset on June 30, 2015. There are no significant alternatives to the proposed amendment and none were considered.

#### 9. FEDERAL STANDARDS:

There are no related federal standards in this area.

#### 10. COMPLIANCE SCHEDULE:

Because of the nature of the proposed amendment, which merely extends for two years (to June 30, 2017) the existing provision in section 100.8 of the Commissioner's Regulations, it is anticipated that school districts and boards of cooperative educational services will be able to achieve compliance with this rule by its effective date.

#### **Regulatory Flexibility Analysis**

##### Small Businesses:

The proposed amendment merely extends for two years (to June 30, 2017) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and boards of cooperative educational services (BOCES) specified by the Commissioner to award a local high school equivalency diploma for adults over age 21, based upon experimental programs approved by the Commissioner, and will not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### 1. EFFECT OF RULE:

The proposed amendment applies to boards of education and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment will ensure that all current National External Degree Program (NEDP) students in the approximately 22 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any new compliance requirements but merely extends for two years (to June 30, 2017) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

#### 3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

#### 4. COMPLIANCE COSTS:

The proposed amendment will not impose any costs on local governments. It merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any costs or new technological requirements on local governments.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements or costs on local governments, but merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts.

#### **Rural Area Flexibility Analysis**

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment will ensure that all current National External Degree Program (NEDP) students in the approximately 22 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma. Of these 22 sites, 8 are in rural areas.

##### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any new compliance requirements on rural areas but merely extends for two years (to June 30, 2017) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment does not impose any additional professional services requirements.

##### 3. COMPLIANCE COSTS:

The proposed amendment will not impose any costs on rural areas. It merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements on rural areas, but merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

##### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

#### **Job Impact Statement**

The proposed amendment merely extends for two years (to June 30, 2017) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Certification Requirements for Teaching Assistants**

**I.D. No.** EDU-52-14-00028-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of sections 80-1.1(b)(24) and 80-5.6 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 305(1), (2), 3001(2), 3004(1), 3006(1)(b) and 3009(1)

**Subject:** Certification requirements for teaching assistants.

**Purpose:** To provide extensions in one year increments on the validity of a Level II teaching assistant certificate for candidates pursuing citizenship; define "school year" for the purposes of calculating experience to meet the certification requirements for a Level I, II or III teaching assistant certificate; and provide a technical amendment to eliminate the words "without fee" in the definition of internship certificate in order to be consistent with other regulations which require a fee for an internship certificate.

**Text of proposed rule:** 1. Paragraph (24) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner shall be amended, effective April 1, 2015, to read as follows:

(24) Internship certificate means the certificate issued a student in a registered or approved graduate program of teacher education which includes an internship experience(s) and who has completed at least one-half of the semester hour requirement for the program and may, at the request of the institution, be issued an internship certificate [without fee].

2. Subdivisions (a) through (d) of section 80-5.6 of the Regulations of the Commissioner shall be renumbered as subdivisions (b) through (e) of section 80-5.6 of the Regulations of the Commissioner of Education and a new subdivision (a) shall be added to section 80-5.6 of the Regulations of the Commissioner, effective April 1, 2015, to read as follows:

(a) *For purposes of this section, school year shall mean a minimum of 180 days of full-time school experience or the substantial equivalent, as defined by the Commissioner.*

3. Subclause (2) of clause (b) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 80-5.6 of the Regulations of the Commissioner shall be amended, effective April 1, 2015, to read as follows:

(2) Time validity. The certificate shall be valid for three years from its effective date and shall not be renewable, except that the validity period of the level II teaching assistant certificate may be extended by the commissioner for a candidate called to active duty in the Armed Forces for the period of active service and an additional 12 months from the end of such service. *The commissioner may also extend the time validity of an expired level II teaching assistant certificate in increments of one year for a candidate who has applied for citizenship or permanent residency, and whose application for citizenship or permanent residency has not been acted upon by the U.S. Citizenship and Immigration Services (USCIS) until the USCIS acts upon such application. Such candidates must provide documentation satisfactory to the department that they meet these requirements, and that they have completed all other requirements for a Level III certificate.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Peg Rivers, State Education Department, Office of Higher Education, Room 979, Washington Avenue, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement**

**STATUTORY AUTHORITY:**

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Education Law section 305 (1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the State's public schools.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in the State's public schools.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue any certificates that the Regents prescribe.

Subdivision (1) of section 3009 of the Education Law provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or part thereof, be collected by a district tax except as provided in the Education Law.

**LEGISLATIVE OBJECTIVES:**

The proposed rule is consistent with the above statutory authority in that it clarifies existing certification requirements for teaching assistants and provides a time extension on the validity of Level II teaching assistant certificate while a candidate is pursuing citizenship, which is required for a Level III teaching assistant certificate.

**NEEDS AND BENEFITS:**

In June 2000, the Board of Regents established the requirements for Teaching Assistant Level I, Level II and Level III certificates. Teaching assistants advance through three levels of certificates (level I through level III). Level I and II certificates are time-limited. In April 2006, the regulations were revised to make the Level I certificate valid for three years and it could be renewed on one occasion only for three years. The Level II certificate is valid for three years and may only be extended by the Commissioner for a candidate called to active duty in the Armed Services for the period of active service and an additional 12 months from the end of such service. To gain the Level III permanent certificate, a candidate must meet the citizenship requirements of section 3001 of the Education law which requires U.S. citizenship or lawful permanent resident status issued by the U.S. Citizenship and Immigration Services (USCIS).

Some teaching assistants have reached the end of the validity of their Teaching Assistant Level II certificate and have not gained the required citizenship status for a Level III certificate. The time period to obtain citizenship status from the USCIS can take numerous years. Therefore, the proposed amendment provides candidates seeking a Level III certificate with an extension in increments of one year while the candidate is pursuing citizenship. In order to gain the time extension, the certificate holder must supply sufficient proof that he/she is pursuing citizenship or lawful permanent residence from the USCIS. SED has a similar regulation in place for teachers, school leaders and pupil personnel pursuing their Professional/Permanent certificate.

The proposed rule also amends sections 80-1.1(24) to remove the reference to "without fee" from the definition of internship certificate in order to be consistent with Section 80-5.9(a). The proposed rule also amends 80-5.6 of the Commissioner's regulations to change the definition of school year for purposes of meeting the experience requirements for certification as a teaching assistant.

**COSTS:**

(a) Costs to State government: The amendment will not impose any additional costs on State government including the State Education Department. The State Education Department will use existing staff and resources to process applications for teaching assistant certificates.

(b) Costs to local government: The amendment will not impose any direct costs on local governments, including school districts and Boards of Cooperative Educational Services (BOCES).

(c) Cost to private regulated parties: The proposed amendment will not impose costs on private regulated parties, over and above existing costs for certification. The application fee for certification as a teaching assistant at each level will continue to be \$50.

(d) Costs to regulating agency for implementation and continued administration of this rule: As stated above in "Costs to State Government," the amendment will not impose any additional costs on the State Education Department.

**LOCAL GOVERNMENT MANDATES:**

Candidates who apply for an extension of a level II teaching assistant certificate will have to submit documentation satisfactory to the department that they are pursuing citizenship, and that they have completed all other requirements for a Level III certificate. The requirements in the proposed rule do not impose any program, service, duty or responsibility on school districts beyond those already imposed by State law or regulation.

**PAPERWORK:**

The proposed amendment does not impose any additional recordkeeping, reporting or other paperwork requirements, except that in order for a candidate to obtain a one year time extension on his/her Level II teaching

assistant certificate, he/she must provide sufficient evidence that he/she is pursuing citizenship.

**DUPLICATION:**

The proposed amendment does not duplicate existing State or federal requirements.

**ALTERNATIVES:**

No significant alternatives were considered.

**FEDERAL STANDARDS:**

There are no Federal standards that address the certification requirements for teaching assistants in New York.

**COMPLIANCE SCHEDULE:**

It is anticipated that parties will be able to achieve compliance with the rule by its effective date.

**Regulatory Flexibility Analysis**

The purpose of the proposed rule is to define “school year” for purposes of meeting the experience requirements for candidates seeking a Level I, II or III teaching assistant certificate. It also provides candidates with an expired Level II teaching assistant certificate with an extension in increments of one-year while they pursue citizenship for purposes of their Level III teaching assistant certificate. In addition, the proposed amendment makes a technical amendment to section 80-1.1 of the Commissioner’s regulations to eliminate the words “without fee” from the definition of internship certificate. The proposed rule does not impose any reporting, recordkeeping or other compliance requirements on small businesses or local governments, and will not have an adverse economic impact, on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

**1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment will affect candidates seeking either a Level I, II or III teaching assistant certificate throughout the State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

**2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

The purpose of the proposed rule is to define “school year” for purposes of meeting the experience requirements for candidates seeking a Level I, II or III teaching assistant certificate. It also provides candidates with an expired Level II teaching assistant certificate with an extension in increments of one-year while they pursue citizenship for purposes of their Level III teaching assistant certificate. In addition, the proposed amendment makes a technical amendment to section 80-1.1 of the Commissioner’s regulations to eliminate the words “without fee” from the definition of internship certificate.

**3. COMPLIANCE COSTS:**

The proposed amendment will not impose costs on private regulated parties, over and above existing costs for certification. The application fee for certification as a teaching assistant at each level will continue to be \$50. The amendment will not impose any direct costs on local governments, including school districts and BOCES.

**4. MINIMIZING ADVERSE IMPACT:**

The purpose of the proposed rule is to define “school year” for purposes of meeting the experience requirements for candidates seeking a Level I, II or III teaching assistant certificate. It also provides candidates with an expired Level II teaching assistant certificate with an extension in increments of one-year while they pursue citizenship for purposes of their Level III teaching assistant certificate. In addition, the proposed amendment makes a technical amendment to section 80-1.1 of the Commissioner’s regulations to eliminate the words “without fee” from the definition of internship certificate. The State Education Department does not believe that establishing different standards for candidates who live or work in rural areas is warranted. A uniform standard ensures the quality of certified teaching assistants in all parts of the State.

**5. RURAL AREA PARTICIPATION:**

The proposed amendment was submitted for review and comment to the Department’s Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

**6. INITIAL REVIEW OF RULE (SAPA § 207):**

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of the proposed amendment shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed rule is necessary to implement Regents policy on certification standards for teaching assistants. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published here-with, and must be received within 45 days of the State Register publication date of the Notice.

**Job Impact Statement**

The purpose of the proposed amendment is to allow candidates seeking a Level III certificate with a one-year time extension, which may be renewed one year at a time to the holders of Teaching Assistant Level II certificate while they are pursuing citizenship. It also makes a technical amendment to the definition of an internship certificate to conform to other sections of the regulations and defines “school year” for purposes of meeting the experience requirements for licensure as a teaching assistant. The proposed amendment does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

**Deer Hunting in Suffolk County**

**I.D. No.** ENV-42-14-00005-A

**Filing No.** 1038

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 1.11 and 1.24 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0903, 11-0907 and 11-0911

**Subject:** Deer hunting in Suffolk County.

**Purpose:** Expand and simplify deer hunting seasons and regulations in Suffolk County.

**Text of final rule:** Amend existing paragraph 6 NYCRR 1.11(a)(3) and adopt a new paragraph (4) to read as follows:

(3) Westchester County[and Suffolk County].

Season	Season Dates
Regular	October 1 through December 31

(4) Suffolk County.

Season	Season Dates
Regular	October 1 through January 31

Repeat existing section 6 NYCRR 1.24 and adopt a new section 1.24 to read as follows:

§ 1.24 *Special Firearms Deer Season in Suffolk County.*

(a) *Season Dates:* The first Sunday in January through January 31.

(b) *Hunting Hours:* Sunrise to sunset.

(c) *Legal Implements:* For the special firearms season, deer may be taken only by: shotgun, using a single ball or slug; or muzzleloading rifle or pistol, shooting a single projectile having a minimum bore of 0.44 inches. Shotgun barrels may be rifled, and telescopic sights may be used.

(d) *Valid Tags:* Regular Season Deer tag, Deer Management Permit (DMP) and Bonus DMPs for Unit 1C, Bow/Mz either-sex tag, and Bow/Mz antlerless-only tag. Deer of either sex may be taken with Regular season tag.

(e) *Town Permits:* No person shall hunt deer with a shotgun or muzzleloader during the special firearms season in Suffolk County unless such person possesses a special town hunting permit, provided, however, that a town may by local law waive the requirement for the special permit in accordance with the requirements of ECL 11-0903. The special permits shall be issued as follows:

(1) Permits, furnished by the Department of Environmental Conservation, shall be issued by the town clerks or their designee for their respective towns only, and only until the quota for each town is exhausted. The annual quotas are as follows:

Babylon	200
Brookhaven	5,000
East Hampton	3,000
Huntington	500
Islip	200
Riverhead	3,000
Shelter Island	1,000
Smithtown	1,000
Southampton	2,500
Southold	1,000

(2) In order to obtain a town permit, a hunter must complete the Application for a Town Permit and present it to the town clerk or their designee, along with a completed Landowner's Endorsement form and a valid hunting license, complete with big game carcass tags.

(3) Town permits are issued only to holders of properly completed permit applications. Each permit authorizes the holder to hunt deer only in the town specified on it, and only on the property for which the permit holder has a properly completed and endorsed Landowner's Endorsement form. Permits are not transferable.

(f) Landowner's Endorsement: The Landowner's Endorsement constitutes the landowner's or lessee's written consent for a person to hunt on his or her lands in accordance with the conditions of the special season. The Landowner's Endorsement form must be signed by a person who owns or leases ten or more acres of land in the town where application is to be made, certifying that such owner or lessee gives consent to the applicant to hunt deer on his premises in accordance with the conditions of the special season.

(g) Town permit applications and Landowner's Endorsement forms may be obtained from the New York State Department of Environmental Conservation, Region 1 Bureau of Wildlife Office in Stony Brook, and may also be available from the Department's website or other Department-approved outlets.

(h) While hunting, an individual must carry his or her hunting license and big game tags, signed Landowner's Endorsement form and valid Town Permit (except in towns where the permit requirement has been waived). Successful hunters must follow all deer reporting, tagging and check station procedures, as specified in ECL 11-0911 or as otherwise directed by the Department.

(i) Any holder of a special hunting permit who the Department has reason to believe has violated any provisions of the Environmental Conservation Law, or of regulations promulgated thereunder, while hunting pursuant to such permit, shall surrender the permit to the department, and upon conviction or settlement for such violation such permit may be revoked. Any permit application or permit obtained by fraud, or by a person not entitled to be issued it or who makes a false statement in applying for it, shall be void. No permit application or permit shall be replaced if it is lost, stolen or destroyed.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 1.24(c).

**Text of rule and any required statements and analyses may be obtained from:** Vicky Wagenbaugh, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8883, email: vicky.wagenbaugh@dec.ny.gov

**Revised Regulatory Impact Statement, Revised Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement**

The original Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement as published in the Notice of Proposed Rule Making, remains valid and does not need to be amended.

#### Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

#### Assessment of Public Comment

This rule making was necessary to implement provisions of legislation enacted on August 11, 2014, that provides the Department of Environmental Conservation (DEC or department) express authority to: allow deer

hunting on Saturdays and Sundays during the special January firearms season in Suffolk County; allow taking of deer by longbow during January in Suffolk County; and provided that towns in Suffolk County may waive the issuance of the additional permit presently required. The department received approximately 300 public comments on the proposed rulemaking. Several writers mistakenly equated the proposed rulemaking with other deer management actions conducted within several municipalities on the east end of Long Island.

A summary of the comments and the department's response follows:

**Comment:** Several writers expressed support for the proposed regulations, indicating that hunting is a viable management tool needed to reduce deer populations and reduce the negative impacts of deer on local habitats and motorists.

**Response:** The department agrees. In addition to the benefits of contributing to deer population management, the proposed regulation changes will also simplify the administrative requirements for hunters, Town governments, and the department.

**Comment:** DEC should encourage Towns to waive the permitting requirement so as to lessen the administrative workload. DEC should also work with the legislature to change the existing law to allow use of crossbows during the January deer season.

**Response:** The department has and will continue to recommend that Suffolk County Towns utilize the newly authorized option to waive the town permit requirement during the January Firearms Deer Season. Crossbows were not addressed by the August 2014 legislation or this rulemaking, though the department supports use of crossbows in Suffolk County during all hunting seasons.

**Comment:** Several comments supported the proposal and welcomed the additional opportunity to hunt.

**Response:** The proposed rulemaking is consistent with recommendations in the NYS Deer Management Plan ([www.dec.ny.gov/docs/wildlife\\_\\_pdf/deerplan2012.pdf](http://www.dec.ny.gov/docs/wildlife__pdf/deerplan2012.pdf)) to include weekend hunting during the January Firearms Deer Season and provide additional hunting opportunity to business owners and school-aged hunters.

**Comment:** One writer expressed support for the rulemaking, suggesting that using hunters to remove excess deer is preferential to tax payer funded deer culls by contractors.

**Response:** The department anticipates that this rulemaking will promote an incremental increase in deer harvest, as is desired throughout Suffolk County. However, the department also fully expects that organized culls will remain necessary in specific locales within Suffolk County to achieve greater, more intensive deer population reductions to alleviate crop damage on agricultural lands or deer impacts in communities.

**Comment:** Many writers expressed opposition to deer hunting generally or bowhunting specifically and indicated their personal values against killing animals, beliefs that hunting is inhumane, or that human use of wildlife is inappropriate. Some opposed increasing the number of deer hunting permits to be issued (and therefore, the number of deer that may be killed) in Suffolk County. Frequently these writers suggested that only non-lethal techniques be considered for deer management.

**Response:** We realize that some people do not approve of deer hunting. However, deer hunting is supported by a strong majority of Americans, is an essential element of deer population management, and is codified in the New York's Environmental Conservation Law (ECL), as established by the New York State Legislature, which specifically authorizes hunting of animals as a legitimate use of our wildlife resources and means of population control. Moreover, the Legislature explicitly authorized the department in August 2014 to expand and simplify deer hunting seasons and regulations in Suffolk County to help control deer populations on eastern Long Island. This rulemaking implements provisions of that legislation, and the department is obligated to adopt regulations in accordance with the law as written. Non-lethal management options for deer, including chemical contraception and surgical sterilization, have not proven to be viable, stand-alone methods to effectively reduce free-ranging deer populations and deer-related impacts as is needed in Suffolk County.

**Comment:** Other writers opposed the expanded hunting opportunity, stating that it will prevent hikers and residents from enjoying the woods, will increase deer-vehicle collisions, and will jeopardize safety particularly of children and pets. Several writers suggested variations of weekend hunting, such as allowing deer hunting on every other weekend in January or on Saturdays but not Sundays.

**Response:** The proposed rule does not prevent the public from accessing and using private lands throughout Suffolk County for recreation at any time of year. Likewise, extensive opportunities exist for non-hunting recreationists to use public lands in Suffolk County throughout the year. A list of public access locations in Suffolk County is available at [www.dec.ny.gov/outdoor/7809.html](http://www.dec.ny.gov/outdoor/7809.html). To best facilitate use of department managed lands in Suffolk County by a variety of user-groups, minimize user conflicts, and control environmental impacts of some activities, the department does restrict some activities (e.g., horseback riding and

bicycling) to specific properties and limit access for various activities during specific times of year. During the January firearms deer season, non-hunting recreationists may not use department owned lands that are open to firearms deer hunting. However, several department managed properties are not open for firearms deer hunting (i.e., Calverton Woods, Edgewood, Kings Park Unique Area, Ridge Conservation area, Southampton Cooperative hunting areas, and East Hampton Cooperative hunting areas), and the public may continue to use these properties for hiking, bicycling, photography, cross-country skiing and other purposes during the fall and winter. Regulations for use of department managed lands in Suffolk County are available at [www.dec.ny.gov/outdoor/40419.html](http://www.dec.ny.gov/outdoor/40419.html). It should be noted also that outdoor recreation of all kinds occurs throughout deer hunting seasons on millions of acres of public and private land in upstate New York. For these reasons, the department does not see the need to restrict deer hunting on weekends in January. Further, to do so would be counter to the recent legislation which authorized deer hunting on weekends.

The department does not expect any increase in deer vehicle collisions due to the additional opportunity for bowhunters and inclusion of weekends to the January Firearms Season. Deer vehicle collisions tend to peak during October and November during the deer breeding season. A secondary peak often occurs in May and June due to natural dispersal of yearling deer. Finally, with over 60 years of Sportsman Education for new hunters, New York hunters have an excellent safety record. Statistically, hunting is a very safe recreational pursuit with fewer injuries per 100 participants than most team sports, and hunting-related accidents involving non-hunters are exceptionally rare.

**Comment:** Several writers opposed the increase in town permit quotas and suggested this will result in an unprecedented deer harvest.

**Response:** NYS Environmental Conservation Law requires hunters participating during the January Firearms Deer Season to obtain a town permit and for the department to set a quota of permits for each town. The proposed rule added all Suffolk County towns to the list, as previously only five towns were listed, and increased the quotas available for each town. Past practice had been to restrict hunters from obtaining a town permit for more than one town until the latter portion of the January season. Increasing the town permit quota will make it feasible to issue multiple town permits from the beginning of the season, giving hunters more flexibility in where they can hunt throughout the season. The department does not anticipate appreciable increases in deer harvest because of the change in town permit availability, although an appreciable increase in deer harvest is desirable for Suffolk County. Relatedly, in Appendix 5 of the NYS Deer Management Plan ([www.dec.ny.gov/docs/wildlife\\_\\_pdf/deerplan2012.pdf](http://www.dec.ny.gov/docs/wildlife__pdf/deerplan2012.pdf)), the department recommends eliminating the town permits as the requirement to obtain a town permit is cumbersome for hunters, municipalities and the department, and is inconsistent with hunting requirements elsewhere in New York.

**Comment:** Several writers opposed the rulemaking proposal, suggesting that coyote hunting be eliminated in Suffolk County or predators, specifically wolves, be introduced to reduce deer numbers.

**Response:** Coyote hunting is not currently lawful in Suffolk County, nor do coyotes exist in Suffolk County in any appreciable number. The Department does not consider the introduction of wolves to Suffolk County to be a viable management option, socially or ecologically.

**Comment:** One writer expressed concern that the description of legal implements for the January firearms season could be incorrectly read to prohibit the use of longbows, which are otherwise allowed during the concurrent bowhunting season.

**Response:** We changed the word "During" to "For" in subdivision 1.24 (c) of the regulation, to help clarify that only firearms may be used to take deer pursuant to the Special January season regulations, but longbows may be used at the same time pursuant to the regular bowhunting season that was extended to January 31. Additional clarification will be included in department communications about deer hunting seasons in Suffolk County.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Control of Criteria Air Contaminants and Toxic Air Contaminants from General Process Air Pollution Sources

I.D. No. ENV-52-14-00027-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Repeal of Part 212; addition of new Part 212; and amendment of Part 200 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0105, 19-0303, 19-0311, 71-2103 and 71-2105

**Subject:** Control of criteria air contaminants and toxic air contaminants from general process air pollution sources.

**Purpose:** To clearly define the federal and state requirements of the existing Part 212 rule, General Process Emission Sources.

**Public hearing(s) will be held at:** 1:00p.m., February 4, 2015 at Department of Environmental Conservation Headquarters, Public Assembly Rm. 129A and B, 625 Broadway, Albany, NY; 9:00a.m., February 5, 2015 at Department of Environmental Conservation Region 2 Office, One Hunters Point Plaza, 47-40 21st St., Rm. 834, Long Island City, NY; 1:00p.m., February 6, 2015 at Department of Environmental Conservation Region 7 Office, 615 Erie Blvd., West Syracuse, NY; 4:00p.m., February 9, 2015, Sheridan Parkside Community Center, 169 Sheridan Parkside Dr., Tonawanda, NY.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Substance of proposed rule (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** The Department of Environmental Conservation (Department) is proposing to repeal and replace 6 NYCRR Part 212 (Part 212) to streamline and update its provisions, align those provisions with the Department's permitting regulations, and provide more regulatory certainty for the regulated community. Currently, Part 212 regulates air emission sources associated with a process operation by establishing emissions limits for the release of toxic air contaminants. This rulemaking proposes to: establish consistent terminology between Part 212 and 6 NYCRR Part 200 (Part 200) and 6 NYCRR Part 201 (Part 201); establish a Toxic- Best Available Control Technology (T-BACT) standard for toxic air contaminants; clarify the interaction between Part 212 and the National Emission Standards for Hazardous Air Pollutants (NESHAPs); offer a streamlined approach for demonstrating compliance with regulatory standards for air contaminants by adopting a mass emission rate option; replace the current Part 212 control requirement, which provides the Commissioner with discretion to establish the degree of required air cleaning, with a performance of air dispersion modeling analysis in order to demonstrate compliance with Department Guideline Concentrations or National Ambient Air Quality Standards (NAAQS); control High Toxicity Air Contaminants (HTACs) to the greatest extent possible; and generally reorganize and clarify Part 212. Aside from renumbering and replacement of the term "Lower Orange County" with a list of regulated Orange County towns, this proposed rulemaking does not change the language of existing Section 212.10, "Reasonably Available Control Technology for Major Facilities," which is proposed Subpart 212-3. Neither does this proposed rulemaking change the language of existing Section 212.12, "Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants," other than renumbering the section to Section 212-2.4 in line with the proposed new numbering.

Proposed Part 212 will be reorganized; its terms and federal requirements will be updated; and it will present five changes to the way the rule is currently enforced. First, proposed Part 212 introduces an alternative compliance option for HTACs. Second, for all toxic air contaminants controlled by NESHAPs, proposed Part 212 allows demonstrated compliance with the federal program as sufficient to demonstrate compliance under Part 212. This change would not apply to the emissions of HTACs, which would require a Toxic Impact Analysis (TIA) to demonstrate compliance. Third, for non-criteria air contaminants, proposed Part 212 implements T-BACT in order to more effectively regulate toxic air contaminants. Fourth, proposed Part 212 allows regulated entities to perform air dispersion modeling analysis in order to demonstrate compliance with either the NAAQS or Annual and Short-term guideline concentrations (AGC/SGC) for emission sources with lesser emission rates. Finally, proposed Part 212 lowers the emission rate for when control requirements become applicable, from 1 pound per hour to 0.1 pounds per hour for A-rated, non-criteria air contaminants. Part 200 ("General Provisions") will be revised to include a new definition for the determination of toxic equivalency factors for Dioxin and Dioxin-Like Compounds; and to incorporate by reference federal NSPS and NESHAPs.

The evaluation process included in Part 212 is applied (1) when a regulated entity applies for a new or modified permit or registration for process emission sources and/or emission points; or (2) upon issuance of a renewal for an existing permit or registration. Compliance with Part 212 will work in a step-wise manner. The first step is to demonstrate all emission of HTACs are below the mass emission threshold limits. If a regulated entity can comply with the first step, the Part 212 evaluation process is complete. If not, the regulated entity will progress through the next steps of identifying hourly and yearly emissions of criteria, non-criteria air

contaminants, and HTACs, receiving environmental ratings for these emissions, conducting any modeling if necessary, and determining how to proceed after evaluating these emissions amounts within the parameters of the regulatory tables contained in Subdivisions 212-2.3(a) Table 3 and (b) Table 4, taking off ramps from the Part 212 analysis whenever a step is satisfied. This step-wise process is discussed in detail in the Express Terms Summary as well as in the Regulatory Impact Statement. Any emission limitation in effect prior to the effective revision date of Part 212 shall remain in effect until a permit modification is submitted for an applicable process emission source or emission point or renewal of the permit or registration.

The first step a regulated entity must take to determine compliance under proposed Part 212 is to determine whether that entity has any process sources that are regulated. While proposed Part 212 regulates emissions from most process sources, proposed Section 212-1.4 provides a list of process sources that are excepted from regulation under the part. For all sources that fall under this exceptions list, the regulatory process under proposed Part 212 is over.

If a regulated entity does not fall under the exceptions list contained in Section 212-1.4, that entity must supply to the Department a list of all criteria and non-criteria air contaminants and their hourly and yearly emissions rates. The Department will verify this list and assign these air contaminants an environmental rating based on the four factors in Section 212-1.3: toxicity of the air contaminant; how the air contaminant is dispersed; where the dispersed air contaminant lands; and the number of other sources emitting this contaminant in surrounding areas. Once the Department has assigned ratings to these air contaminants, the regulated entity may proceed to the next step of the analysis, which depends on whether the facility is emitting a criteria air contaminant (see proposed Subdivision 212-2.3(a) Table 3), a non-criteria air contaminant (see proposed Subdivision 212-2.3(b) Table 4), or an air contaminant listed on the High Toxicity Air Contaminant List (see proposed Section 212-2.2 Table 2 for the list and proposed Subdivision 212-2.3(b) Table 4 for Degree of Air Cleaning Required for Non-Criteria Air Contaminants).

#### Criteria Air Contaminants:

If a regulated entity has emissions of criteria air contaminants and the entity provides verification that a regulated source emits less than one pound per hour for A-rated contaminants or less than 10 pounds per hour for B- or C-rated contaminants, and demonstrates that the offsite ambient concentrations from these emission points do not exceed the NAAQS concentrations, the Part 212 evaluation process ends and the entity is in compliance for those contaminants. However, if a regulated source emits one pound or greater per hour for A-rated contaminants or 10 pounds or greater per hour for B- or C-rated contaminants, the facility must employ control technology to achieve – depending on the amount of air contaminant emitted – 99 percent emissions reductions or greater for A-rated contaminants; between 90 percent and 99 percent or greater emissions reductions for B-rated contaminants; and between 70 percent and 98 percent or greater emissions reductions for C-rated contaminants.

#### Non-Criteria Air Contaminants:

If a regulated entity has emissions of non-criteria air contaminants not listed in the HTAC List (see proposed Section 212-2.2 Table 2) and the entity provides verification that a regulated source emits less than 0.1 pounds per hour for A-rated contaminants or less than 10 pounds per hour for B- or C-rated contaminants, and demonstrates that the off-site ambient concentrations from these emission points do not exceed the air concentrations contained in the Department's SGC and AGC tables, the Part 212 evaluation process ends and the entity is in compliance for those contaminants. However, if the regulated entity emits a non-criteria air contaminant that is assigned an A rating and emits 0.1 pounds or greater per hour, or emits 10 pounds or greater per hour for any B- or C-rated, non-criteria air contaminant, the facility must either engage in pollution prevention techniques that decrease emissions, apply control technology, or both, to achieve – depending on the amount of air contaminant emitted – between 90 percent and 99 percent emissions reductions for A-rated contaminants; 90 percent emissions reductions for B-rated contaminants; or 75 percent emissions reductions for C-rated contaminants. If the facility is unable to achieve sufficient emissions reductions at this point, it would need to engage in a T-BACT analysis, which is described in detail below.

#### High Toxicity Air Contaminants (HTACs):

For HTACs, the evaluation process is essentially the same as that for non-criteria air contaminants. First, the regulated entity must determine for each individual HTAC whether its HTAC emissions from all process operations are less than the HTAC mass emission limits. Next, the regulated entity would determine whether the facility emits 0.1 pounds or greater of a HTAC per hour for A-rated contaminants or 10 pounds or greater of a HTAC per hour for B- and C-rated contaminants. If a regulated entity emits HTACs assigned a B or C rating, where emissions are less than 10 pounds per hour and maximum offsite concentrations are less than the AGC/SGC, the Part 212 evaluation process ends. For an A-rated

HTAC, a facility must emit less than 0.1 pounds per hour, emit less than the PB trigger (if applicable) (see proposed Section 212-2.2 Table 2) of ten times the mass emission limit, and demonstrate that the maximum offsite air concentration is less than the corresponding SGC/AGC. If a regulated entity emits more than these values for A-, B-, or C-rated air contaminants, it would have to engage in various pollution prevention techniques or combinations thereof, such as product substitution, and/or apply control technology. If the entity was still unable to achieve sufficient emissions reductions, it would need to engage in a T-BACT analysis.

Under T-BACT, the regulated entity must provide the Department with an analysis of whether there is an existing control technology that could limit that facility's emissions of non-criteria contaminants or HTACs and whether it is feasible to install that technology. T-BACT analysis would be conducted on a case-by-case basis, where the Department would determine the maximum achievable reductions or emissions limitations for a non-criteria air contaminant. The Department would make this determination based upon the several parameters contained in proposed Paragraph 212-1.2(b)(20). T-BACT need not be a last resort, a regulated entity may engage in a T-BACT analysis at any point during the step-wise process.

The Division of Air Resources is proposing to rename Part 212 to "Process Operations" and reorganize it into four subparts: General Provisions (212-1), Allowable Emissions from Process Operations (212-2), Reasonably Available Control Technology for Major Facilities (212-3), and Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants (212-4).

#### Subpart 212-1 General Provisions

Proposed Section 212-1 'Applicability' establishes when facility owners or operators are required to demonstrate compliance with the new Part 212. The proposal requires compliance upon issuance of a new or modified permit or registrations, and during the renewal process for permits and registrations.

Proposed Section 212-1.2 'Definitions' will introduce definitions that are currently in guidance only, such as 'Animal Oncogens', 'Carcinogenic to Humans', 'Guideline Concentrations', 'Genotoxic Chemicals', 'High Toxicity Air Contaminants', 'Likely to be Carcinogenic to Humans', 'Lethal Dose Fifty or Lethal Concentration Fifty (LD50 or LC50)', 'Low Toxicity Air Contaminant', 'Moderate Toxicity Air Contaminants', 'Persistent and Bioaccumulative (PB) Trigger', 'Toxic - Best available control technology (T-BACT)', 'Reproductive and Developmental Chemical', and 'Toxic Impact Assessment'.

Proposed Section 212-1.3 'Determination of environmental rating' has been revised to be consistent with the current 6 NYCRR Part 201 permitting and registrations requirements.

Proposed Section 212-1.4 'Exceptions' has been revised to be consistent with 6 NYCRR Part 201 permitting and registrations requirements; and to include new or revised regulations which qualify for an exception to Part 212.

Proposed Section 212-1.5 'Determining applicable emission standards for process operations' has been revised to include the provisions of Toxic Best Available Control Technology (T-BACT) under Subdivision 212-1.5(d). Paragraph 212-1.5(e)(2) includes the revised language to coordinate the overlap between the federal 40 CFR Part 63 National Emission Standard for Hazardous Air Pollutant (NESHAP) program and the revised Part 212. Subdivision 212-1.5(f) has been revised to clear up inconsistencies between compliance options required under Subpart 212-3 VOC and NOx Reasonably Available Control Technology for Major Facilities and control requirements in Subdivision 212-2.3(b) Table 4.

Proposed Section 212-1.6 'Limiting of opacity' has not been revised.

Proposed Section 212-1.7 'Sampling and monitoring' has been reformed to conform to the requirements of the Department of State.

#### Subpart 212-2 Allowable Emissions from Process Operations

Proposed Section 212-2.1 'Requirements' has been introduced to clearly define the allowable emissions from emission sources of criteria and non-criteria air contaminants. Subdivision 212-2.1(a) introduces the alternative compliance option for High Toxicity Air Contaminants (HTACs). Subdivision 212-2.1(b) introduces Tables 3 and 4. Table 3 is similar to the current Section 212.9 Table 2 but is now specifically for criteria air contaminants. Table 4 is a new table and is specifically for non-criteria air contaminants. The purpose of the proposed change is to clearly delineate the requirements between the two different types of air contaminants.

Proposed Section 212-2.2 Table 2 'High Toxicity Air Contaminant' list introduces the non-criteria toxic air contaminants for the alternative compliance action allowed under Subdivision 212-2.1(a).

Proposed Section 212-2.3 Table 3 and Table 4 (a) Table 3 – 'Degree of air cleaning required for criteria air contaminants and non-criteria air contaminants' respectively.

Proposed Section 212-2.4 'The control of particulate emissions released

from existing process emission sources' has not been revised and reflects the control of particulate emissions being controlled under Section 212.4 currently.

Proposed Subdivision 212-2.5(a) Table 5 'Process weight source categories' has not been revised and is the same table found in Section 212.9 Table 4 currently. Proposed Subdivision 212-2.5(b) has not been revised and is the same table found in Section 212.9 Table 5 currently.

Subpart 212-3 Reasonably available control technology for major facilities.

Proposed Subpart 212-3 represents the requirements for facility owners or operators subject to reasonably available control technologies (RACT) for major facilities. Subpart 212-3 replicates the requirements of Section 212.10 currently, with one change. The current rule refers to owners and/or operators of facilities located in the Lower Orange County or New York City metropolitan areas and the proposed rule defines this as owners and/or operators of facilities located in the Orange County towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick, and Woodbury or New York City metropolitan areas.

Subpart 212-4: Control of nitrogen oxides for hot mix asphalt production plants

Proposed Subpart 212-4 replicates the requirements of Section 212.12 currently with one change.

Included in 212-1 is a definition for hot mix asphalt plants.

Finally, a new Subdivision (cx), 'Polychlorinated Dibenzo-para-dioxins and Polychlorinated Dibenzofurans', containing definitions and equivalents using the toxic equivalency factors (TEFs), would be added to Section 200.1, while 200.9 has been updated by incorporating four new federal regulations by reference and by removing three obsolete federal regulations from 1989.

**Text of proposed rule and any required statements and analyses may be obtained from:** Thomas Gentile, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3259, (518) 402-8402

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** February 17, 2015.

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

#### Summary of Regulatory Impact Statement

The Department of Environmental Conservation (Department) is proposing to repeal and replace 6 NYCRR Part 212 (Part 212) to streamline and update its provisions, align those provisions with the Department's permitting regulations, provide more regulatory certainty for the regulated community, and ensure public health and welfare. Currently, Part 212 regulates air emission sources associated with a process operation by establishing air pollution control requirements for the release of toxic air contaminants. This rulemaking proposes to: establish consistent terminology between Part 212 and 6 NYCRR Part 200 (Part 200) and 6 NYCRR Part 201 (Part 201); establish a Toxic- Best Available Control Technology (T-BACT) standard for toxic air contaminants; clarify the interaction between Part 212 and the National Emission Standards for Hazardous Air Pollutants (NESHAPs); offer a streamlined approach for demonstrating compliance with regulatory standards for air contaminants by adopting a mass emission rate option; replace the current Part 212 control requirement, which provides the Commissioner with discretion to establish the degree of required air cleaning, with a performance of air dispersion modeling analysis in order to demonstrate compliance with Department Guideline Concentrations or National Ambient Air Quality Standards (NAAQS); control High Toxicity Air Contaminants (HTACs) to the greatest extent possible; and generally reorganize and clarify Part 212. Aside from renumbering and replacement of the term "Lower Orange County" with a list of regulated Orange County towns, this proposed rulemaking does not change the language of existing Section 212.10, "Reasonably Available Control Technology for Major Facilities," which is proposed Subpart 212-3. Neither does this proposed rulemaking change the language of existing Section 212.12, "Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants," other than renumbering the section to Section 212-2.4 in line with the proposed new numbering.

This proposed action would modernize and streamline New York's regulatory scheme for air quality control of process operations and, in so doing, would strengthen the Department's ability to protect public health and the environment, reduce confusion regarding applicability of the regulation for the regulated community, and preserve the State's air resources and sensitive ecosystems.

The statutory authority for this amendment is found in the Environmental Conservation Laws (ECL), Sections 1-0101, 3-0301, 19-0105, 19-0303, 19-0311, 71-2103 and 71-2105. These provisions provide the Department with authority to repeal and replace this regulation.

Proposed Part 212 would include five changes to the way the rule is

currently implemented. First, proposed Part 212 introduces an alternative compliance option for HTACs. Second, for all toxic air contaminants controlled by NESHAPs, proposed Part 212 allows demonstrated compliance with the federal program as sufficient to demonstrate compliance under Part 212. This change would not apply to the emissions of HTACs, which would require a Toxic Impact Analysis (TIA) to demonstrate compliance. Third, for non-criteria air contaminants, proposed Part 212 implements T-BACT in order to more effectively regulate toxic air contaminants. Fourth, proposed Part 212 allows regulated entities to perform air dispersion modeling analysis in order to demonstrate compliance with either the NAAQS or Annual and Short-term guideline concentrations (AGC/SGC) for emission sources with lesser emission rates. Finally, proposed Part 212 lowers the emission rate for when control requirements become applicable, from 1 pound per hour to 0.1 pounds per hour for A-rated, non-criteria air contaminants.

Whenever an air contaminant from an emission source is given an environmental rating of A, B, or C, there is a stepwise progression to ensure that the release of this contaminant does not result in adverse impacts to public health or the environment. Recognizing that Part 212 covers many different industries with numerous types of emission sources, the potential costs of the proposed changes can best be characterized by addressing the steps a facility owner or operator would undertake to eliminate or reduce unacceptable offsite concentrations of air contaminants of concern.

The evaluation process included in Part 212 is applied (1) when a regulated entity applies for a new or modified permit or registration for process emission sources and/or emission points; or (2) upon issuance of a renewal for an existing permit or registration. Compliance with Part 212 would work in a step-wise manner. The first step for a facility would be to demonstrate all emissions of HTACs are below the mass emission threshold limits. If a regulated entity can comply with the first step, the Part 212 evaluation process for HTACs is complete. If not, the regulated entity would progress through the next steps of identifying hourly and yearly emissions of criteria air contaminants, non-criteria air contaminants, and HTACs, receiving environmental ratings for these emissions, and determining how to proceed after evaluating these emissions amounts within the parameters of the regulatory tables contained in Subdivisions 212-2.3(a) Table 3 and (b) Table 4, taking off-ramps from the Part 212 evaluation process whenever a step is satisfied. This step-wise process is discussed in detail in the Express Terms Summary as well as in the Regulatory Impact Statement. Any emission limitation in effect prior to the effective revision date of Part 212 shall remain in effect until a permit modification is submitted for an applicable process emission source or emission point or renewal of the permit or registration.

One of these off-ramps provides that demonstration of compliance with a federal NESHAP for all non-HTACs satisfies the regulatory requirements of Part 212. As a result of this change, regulatory purview of an entity's non-HTACs is complete. However, facilities that emit HTACs may incur costs in some instances, because proposed Subdivision 212-1.5(e) may require owners to go beyond the costs mandated by the federal NESHAP, as is currently the case. Subdivision 212-1.5(e) would require that the facility owner or operator demonstrate that the offsite ambient air concentrations of HTACs would not exceed the Department's SGCs and AGCs even after implementation of the federal NESHAP regulation. However, where a regulated entity uses product substitution as a method of compliance, that entity may see a decrease in costs.

For HTACs, proposed Part 212 would require a process source owner or operator to determine whether the actual facility-wide emissions are less than or greater than the listed mass emission rates in proposed Section 212-2.2. If compliance cannot be demonstrated through the limitation of yearly mass emissions, the process source owner must next demonstrate compliance by using air dispersion modeling. Air dispersion modeling ranges in cost from free for the most rudimentary model as provided by the Department along with technical support; to \$400 to \$500 with yearly renewal costs for entry level screen modeling software from a private vendor; to \$2,500 to \$25,000 for complex dispersion models, used generally only by larger facilities.

A second approach to demonstrating compliance under proposed Part 212 is the elimination or minimization of non-criteria air contaminants from the process emission sources. Product substitution typically means the replacement or reduction of a hazardous substance in products and processes by less hazardous or non-hazardous substances, or measures like work practice standards or energy efficiency measures that achieve equivalent functionality via technological or policy measures.<sup>1</sup> In evaluating the costs of product substitution, the Department has assessed not only the cost of the replacing one solvent for another, but also capital costs, energy differences, labor costs, waste disposal and quality control considerations. In many instances, product substitution can save costs, rather than incur them.

Under proposed Subpart 212-2, non-criteria air contaminants assigned

an Environmental Rating of A would need to be reduced by 99 percent or apply Toxic Best Available Control Technology (T-BACT). T-BACT incorporates the toxicity of chemical and chemical compounds into the evaluation when making a calculated dollar per ton reduction calculation. The Department would only require installation of control technology when a facility is unable to sufficiently reduce offsite air concentrations of HTACs and other non-criteria air pollutants categorized as toxic.

For example, if a facility is engaging in a T-BACT analysis to control particulate HTAC and other toxic particulate air contaminants, the facility could implement fabric filters and wet scrubbers, which are the most commonly-applied control equipment for management of particulate HTACs from process emission sources. For fabric filters, typical required hardware include an in-tandem particle control device, particle cyclone and HEPA filter, the costs of which are calculated based upon the inlet duct area of the device. The capital costs for a pre-treatment cyclone are approximately \$15,000 per square foot (ft<sup>2</sup>) inlet duct<sup>2</sup> and a HEPA filter at \$3 to \$4 per standard cubic foot per minute (scfm) of air treated.<sup>3</sup> However, because operational costs are site specific it is difficult to generalize for all toxic air contaminants.

For wet scrubbers, capital costs range from \$2 to \$6 per scfm of air treated with annual operating costs of \$2.50 to \$48 per scfm of air treated.<sup>4</sup> The addition of disposal costs for chemical additives and the generation of liquid waste would increase the costs associated with these control devices.

Another example of possible costs associated with a facility engaging in a T-BACT analysis involves the control of volatile air contaminants from process emission sources by implementing various types of control equipment, such as oxidizers, chemical adsorption, or wet scrubbing technology. For waste streams with inlet concentrations of VOC greater than 2,000 ppmv, direct flame incinerators require an afterburner capable of achieving 1,600 degrees Fahrenheit, a design feature capable of ensuring a good mixing of air and VOCs and 0.75 second retention time for proper destruction. Units for this application range in cost from \$25 to \$90 per standard cubic feet per minute (scfm) of treatable air and have yearly operating maintenance costs ranging between \$13 and \$175 per scfm.<sup>5</sup> The inlet concentration of highly toxic material, such as HTACs, might not be as concentrated as 2,000 ppmv or have a good mixing profile and these conditions would either require greater fuel usage or a catalytic supplement.

Catalytic incinerators also have been effective at inlet concentrations as low as one ppmv. The catalyst has the effect of oxidizing the inlet gas enabling destruction of the material to occur at lower temperatures and reduce the overall fuel usage. Units for this application range in size from \$22 to \$90 per standard cubic feet per minute (scfm) of air to treat and yearly operating maintenance of \$12 to \$75 per scfm.<sup>6</sup>

Capital costs for chemical adsorbers can range from \$22 to \$87 per scfm, which is similar to incineration capital costs. Chemical adsorbers can also provide the additional benefits of solvent recovery, which can offset the yearly maintenance costs of adsorbent (i.e. carbon), electricity, steam, operating and maintenance labor, and replacement adsorbent (including the replacement labor cost), as well as the interest rate and the useful lives of the adsorbent and the rest of the control system.<sup>7</sup>

Wet scrubbing technology relies on absorption technology, which is different from adsorption described above. In the case of wet scrubbing absorption, organic solvents are dissolved in the scrubbing liquid. The scrubbing liquid can be water or a chemical solvent. These units utilize packing material or trays within the column to increase surface area to enhance absorption. Units for this application range in cost from \$11 to \$55 per scfm, with yearly operating maintenance of \$17 to \$78 per scfm.<sup>8</sup>

Proposed Part 212 may have a marginal effect on small businesses. In a majority of cases, small business owners who currently hold a Registration would not be subject to any new regulatory requirements. This is because most small businesses do not emit an A-rated contaminant and would therefore not be required to undergo the Part 212 evaluation process. However, some small businesses do emit HTACs. In the limited circumstances when a small business process operation emits any of the chemical compounds listed on the HTAC list, the Department's proposal to include yearly mass emission rates for these HTACs provides a clear and simplified approach for small businesses to demonstrate compliance. If, however, an HTAC is also regulated by a NESHAP, the small business emitting that HTAC may incur additional costs in order to come into compliance with Part 212. However, these costs are not necessarily new, as many of these businesses already apply additional add-on technology or engage in modeling under the existing Part 212. While modeling may be a new cost to some small businesses, these businesses are eligible to receive technical assistance from New York's Small Business Environmental Assistance Program (SBEAP). The SBEAP would provide air toxics emissions inventory and modeling support for compliance demonstrations for small businesses impacted by this regulation at no additional cost to the regulated small business.

While the State does have some hospitals and correctional facilities that

are regulated under the existing Part 212, proposed Part 212 should not create additional costs. Additionally, most local governments do not manufacture any products directly, and would thus be minimally impacted by Part 212. However, some local governments do operate hot mix asphalt operations, de-icing operations, and/or wastewater treatment plants with sewage sludge incinerators. While hot mix asphalt and de-icing operations are currently regulated under Part 212, regulation of these facilities would not change under this proposal. Proposed Part 212 may regulate local governments that own wastewater treatment plants, which incorporate a sewage sludge incinerator component as part of current operations within their districts. As a result, these facilities would need to determine if certain provisions of Part 212 apply.

Local Governments subject to this regulation would experience the same impacts as members of the regulated community. Therefore, this rulemaking is not an unfunded mandate imposed on local governments.

The cost to the regulated industry was determined by contacting consultants within New York who provide regulatory permit support services. Air pollution abatement operating cost figures were taken from "Pollution Abatement Cost and Expenditures: 2005", a document prepared by the United States Census Bureau.<sup>9</sup> This document provides cost information by State, media and category (i.e. labor, energy, material and supplies, contract cost) and is the latest available at this time.

This rulemaking would require the collection of facility specific emissions information and emission point parameters for all Title V and State Facility permits when demonstrating compliance with the proposed changes, as is currently required.

This proposed regulation would not duplicate any standards, but does build upon the federal NESHAPs as a floor for compliance and enforcement. The proposed Part 212 has been designed by referencing the federal standards for technology-based Maximum Achievable Control Technology (MACT) employed under section 112(d) of the Clean Air Act<sup>10</sup>, but has subsequently tailored the best possible protection of New York's health, environment and industry above and beyond that reference point.

The Department considered several alternatives before submitting a proposal for repeal and subsequent replacement of a new Part 212 including taking no action and adopting the federal program. Taking no action was rejected because Part 212 needs to be updated and streamlined. Adopting the federal program was deemed to be insufficient to protect public health and the environment.

<sup>1</sup> Substitution of Hazardous Chemicals in Products and Process, Report compiled for the Directorate General Environment, Nuclear Safety and Civil Protection of the Commission of the European Communities. March 2003

<sup>2</sup> USEPA – Stationary Source Control Techniques Document for Fine Particulate Matter, Integrated Policy and Strategies Group (MD-15) Air Quality Strategies and Standards Division October 1998

<sup>3</sup> USEPA – Clean Air Technology Center (CATC) <http://www.epa.gov/ttn/catc/dir1/ff-hepa.pdf>, 2003

<sup>4</sup> USEPA – Clean Air Technology Center (CATC) <http://www.epa.gov/ttn/catc/dir1/fspyrtwr.pdf>

<sup>5</sup> USEPA – Clean Air Technology Center (CATC) <http://www.epa.gov/ttn/catc/dir1/fthermal.pdf>

<sup>6</sup> USEPA – Clean Air Technology Center (CATC) <http://www.epa.gov/ttn/catc/dir1/fcataly.pdf>

<sup>7</sup> USEPA – CATC Technical Bulletin, Choosing and Adsorption System for VOC: Carbon, Zeolite or Polymers, EPA-456/F-99-04, May 1999

<sup>8</sup> USEPA – Clean Air Technology Center (CATC) <http://www.epa.gov/ttn/catc/dir1/fpack.pdf>

<sup>9</sup> U.S. Census Bureau (2008). Pollution Abatement Cost and Expenditures: 2005. ONLINE: [www.census.gov/prod/2008pubs/ma200-05.pdf](http://www.census.gov/prod/2008pubs/ma200-05.pdf)

<sup>10</sup> Clean Air Act section 112(d), 42 U.S.C. 7412(d) (2013)

### Summary of Regulatory Flexibility Analysis

#### EFFECT OF RULE:

The Department of Environmental Conservation (Department) is proposing to repeal and replace 6 NYCRR Part 212 (Part 212) to streamline and update its provisions, align those provisions with the Department's permitting regulations, provide more regulatory certainty for the regulated community, and ensure public health and welfare. This rulemaking proposes to: establish consistent terminology between Part 212 and 6 NYCRR Part 200 (Part 200) and 6 NYCRR Part 201 (Part 201); establish a Toxic-Best Available Control Technology (T-BACT) standard for toxic air contaminants; clarify the interaction between Part 212 and the National Emission Standards for Hazardous Air Pollutants (NESHAPs); offer a streamlined approach for demonstrating compliance with regulatory stan-

dards for air contaminants by adopting a mass emission rate option; replace the current Part 212 control requirement, which provides the Commissioner with discretion to establish the degree of required air cleaning, with a performance of air dispersion modeling analysis in order to demonstrate compliance with Department Guideline Concentrations or National Ambient Air Quality Standards (NAAQS); control High Toxicity Air Contaminants (HTACs) to the greatest extent possible; and generally reorganize and clarify Part 212. Aside from renumbering and replacement of the term "Lower Orange County" with a list of regulated Orange County towns, this proposed rulemaking does not change the language of existing Section 212.10, "Reasonably Available Control Technology for Major Facilities," which is proposed Subpart 212-3. Neither does this proposed rulemaking change the language of existing Section 212.12, "Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants," other than renumbering the section to Section 212-2.4 in line with the proposed new numbering.

#### COMPLIANCE REQUIREMENTS:

Proposed Part 212 includes five changes to the way the rule is currently implemented: (1) First, proposed Part 212 introduces an alternative compliance option for HTACs. Second, for all toxic air contaminants controlled by NESHAPs, proposed Part 212 allows demonstrated compliance with the federal program as sufficient to demonstrate compliance under Part 212. This change would not apply to the emissions of HTACs, which would require a Toxic Impact Analysis (TIA) to demonstrate compliance. Third, for non-criteria air contaminants, proposed Part 212 implements T-BACT in order to more effectively regulate toxic air contaminants. Fourth, proposed Part 212 allows regulated entities to perform air dispersion modeling analysis in order to demonstrate compliance with either the NAAQS or Annual and Short-term guideline concentrations (AGC/SGC) for emission sources with lesser emission rates. Finally, proposed Part 212 lowers the emission rate for when control requirements become applicable, from 1 pound per hour to 0.1 pounds per hour for A-rated, non-criteria air contaminants.

The evaluation process included in proposed Part 212 would be applied (1) when a regulated entity applies for a new or modified permit or registration for process emission sources and/or emission points; or (2) upon issuance of a renewal for an existing permit or registration. Compliance with Part 212 would work in a step-wise manner. First, a regulated entity would demonstrate all emissions of HTACs are below the mass emission threshold limits. If a regulated entity can comply with the first step, the Part 212 evaluation process for HTACs is complete. If not, the regulated entity would progress through the next steps of identifying hourly and yearly emissions of criteria air contaminants, non-criteria air contaminants, and HTACs, receiving environmental ratings for these emissions, and determining how to proceed after evaluating these emissions amounts within the parameters of the regulatory tables contained in Subdivisions 212-2.3(a) Table 3 and (b) Table 4, taking off-ramps from the Part 212 evaluation process whenever a step is satisfied. This step-wise process is discussed in detail in the Express Terms Summary as well as in the Regulatory Impact Statement. Any emission limitation in effect prior to the effective revision date of Part 212 shall remain in effect until a permit modification is submitted for an applicable process emission source or emission point or renewal of the permit or registration.

Affected small businesses and local governments are already required to comply with the existing Part 212, in the same manner as all other owners/operators of subject facilities.

#### PROFESSIONAL SERVICES:

Under this proposal, whether a small business or a local government would require professional services would be completely fact-specific, as would the costs of those services. If the facility operator's initial analysis shows that the facility cannot comply with the listed mass emission rates in proposed Section 212-2.2 for non-criteria pollutants or HTACs emission, the facility operator's next step is to demonstrate by using air dispersion modeling that compliance can be achieved. While some of this analysis is new, it is unvaryingly applied to all regulated entities.

The most rudimentary form of dispersion modeling is called "screen" modeling. For facilities capable of doing the work in-house, the Department offers a free air dispersion model and technical support on its Air Toxics webpage. Entry level screen modeling software is through several independent companies, ranging in price from \$400 to \$500 with yearly renewal costs.<sup>1,2</sup> If a facility must use more complex dispersion models in order to demonstrate compliance with Part 212, the cost of such models increases. The Department contacted various environmental/engineering consultants from across the State, who subsequently provided information regarding the costs of their air dispersion modeling services to the regulated industries.<sup>3,4</sup> The estimated cost ranged from \$2,500 to \$25,000 per facility and is dependent on the age of the facility and the amount of detailed work required. Please refer to the Regulatory Impact Statement for an in depth discussion of examples of these costs.

Sources that are characterized as small businesses are eligible to receive

technical assistance from the Small Business Environmental Assistance Program (SBEAP).

#### COMPLIANCE COSTS:

Proposed Part 212 streamlines the existing regulation in an attempt to ease compliance while minimizing changes in the cost of compliance. For example, proposed Part 212 includes a new HTAC list, proposed Section 212-2.2, Table 2, which establishes a comprehensive list of all chemicals that are subject to regulation via control or elimination. This approach allows facility owners or operators a simplified method to demonstrate compliance. In addition, introduction of mass emission rate compliance allows for easy determination of compliance and eliminates both the initial costs associated with investigating the toxicity of HTACs and subsequent air dispersion modeling. These simplified methods of demonstrating compliance should minimize some costs for regulated entities.

However, this proposed rulemaking does not change existing costs for instances where a facility is unable to comply with the proposed, cost-minimizing compliance methods or where other regulations add additional costs. For example, should a facility emit HTACs at levels greater than the mass emission limits in Table 2, the facility owner or operator would need to invest resources into on air dispersion modeling, product substitution, or the application of T-BACT in order to quantify and control the excess emissions. Another example is where a facility owned by a small business or local governments emits an HTAC or HTACs that are also subject to the federal NESHAP program. While regulatory costs under both Part 212 and the applicable NESHAP should not be new, proposed changes to Subdivision 212-1.5(e) may involve increases to existing costs because it would require facility owners to go beyond the costs mandated by the federal NESHAP program because it would require that the facility owner or operator demonstrate that the offsite ambient air concentrations would not exceed the Department's SGCs/AGCs even after implementation of the federal NESHAP regulation. Small businesses operators who are potentially affected by these proposed changes are operators of chromium electroplating processes, ethylene oxide sterilizing processes, and metal cleaning process operations. However, due to the highly toxic exposure potential of these process operations, many if not all of these process operations have previously been evaluated for offsite concentrations. In addition, SBEAP would provide free air toxics emissions inventory and modeling support for compliance demonstrations for those small businesses impacted by this regulation.

The majority of local governments should be minimally or indirectly impacted by the proposed Part 212. This regulation predominately regulates process sources, many of which are related to manufacturing. Most local governments do not manufacture any product directly, but may operate hot mix asphalt operations or de-icing operations, regulation of which would not be subject to change under the proposed Part 212. However, this revision may impact those local governments that operate wastewater treatment plants that incorporate a sewage sludge incinerator component as part of current operations within their districts. There are currently twelve operating facilities with sewage sludge incinerators in the State. These incinerator-operating, wastewater operations would need to determine if certain provisions of Part 212 apply.

Ultimately, costs under proposed Part 212 would vary from facility to facility, and are determined by things such as age of facility, space, type and amount of air contaminants emitted, whether the facility can achieve compliance by simply engaging in product substitution, or applying control technology; whether a facility needs to implement both product substitution and apply control technology, etc. The proposed changes to Part 212 ensure that all offsite air concentrations for process emission source operations are evaluated consistently across the State. As a result, it is not anticipated that small businesses or local governments would incur any significantly new costs with regard to this rulemaking. For a more in depth discussion of costs, please refer to the Regulatory Impact Analysis.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

Whenever an air contaminant from an emission source is given an environmental rating of A, B, or C, there is a stepwise progression to ensure that the release of this contaminant does not result in adverse impacts to public health or the environment. This process is described above. Recognizing that Part 212 covers many different industries with numerous types of emission sources, the potential costs of the proposed changes can best be characterized by addressing the steps a facility owner or operator would undertake to eliminate or reduce unacceptable offsite site concentrations of air contaminants of concern.

#### MINIMIZING ADVERSE IMPACTS:

The proposed rule focuses on sources not regulated by the federal regulations for the emissions of toxic contaminants. The proposed rule is designed to eliminate air dispersion modeling analyses where possible, by implementing a compliance strategy based upon mass emission limits. The Department would also maintain free modeling software on the State's website for applicants to conduct modeling, when appropriate, so as to eliminate consulting fees.

### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department held public information sessions on a pre-proposal of this rulemaking in Albany on November 12, 2013, Long Island City on October 30, 2013, and Buffalo on October 22, 2013. The Department plans on holding additional public hearings during the proposal stage at various locations throughout New York State. There would be a public comment period in which interested parties who are unable to attend a public hearing can submit written comments on the proposed regulation.

#### CURE PERIOD:

The Department does not believe that there is a need for a cure period for the proposed Part 212 because a facility would only need to conduct a Part 212 review upon issuance of a new or modified permit or registration or upon issuance of a renewal for an existing permit or registration. Any emission limitation in effect prior to the effective revision date of this Part shall remain in effect until that time.

<sup>1</sup> Lakes Environmental, <http://www.weblakes.com/products/aerscreen/buy.html>, 2012

<sup>2</sup> BREEZE Environmental, <http://www.breeze-software.com/pricing/>, 2012

<sup>3</sup> Personal Communication August 26, 2013. Ms. Margaret Valis (NYS-DEC Division of Air Resources) with Mr. B. Stormwind (ENSR/AECOM - Environment) Syracuse, New York

<sup>4</sup> Personal Communication August 26, 2013. Ms. Margaret Valis (NYS-DEC Division of Air Resources) with Mr. K. Skipka (RTP Environmental Associates) Westbury, New York

#### *Rural Area Flexibility Analysis*

The Department of Environmental Conservation (Department) is proposing to repeal and replace 6 NYCRR Part 212 (Part 212) to streamline and update its provisions, align those provisions with the Department's permitting regulations, provide more regulatory certainty for the regulated community, and ensure public health and welfare. Currently, Part 212 regulates air emission sources associated with a process operation by establishing air pollution control requirements for the release of toxic air contaminants. This rulemaking proposes to: establish consistent terminology between Part 212 and 6 NYCRR Part 200 (Part 200) and 6 NYCRR Part 201 (Part 201); establish a Toxic- Best Available Control Technology (T-BACT) standard for toxic air contaminants; clarify the interaction between Part 212 and the National Emission Standards for Hazardous Air Pollutants (NESHAPs); offer a streamlined approach for demonstrating compliance with regulatory standards for air contaminants by adopting a mass emission rate option; replace the current Part 212 control requirement, which provides the Commissioner with discretion to establish the degree of required air cleaning, with a performance of air dispersion modeling analysis in order to demonstrate compliance with Department Guideline Concentrations or National Ambient Air Quality Standards (NAAQS); control High Toxicity Air Contaminants (HTACs) to the greatest extent possible; and generally reorganize and clarify Part 212. Aside from renumbering and replacement of the term "Lower Orange County" with a list of regulated Orange County towns, this proposed rulemaking does not change the language of existing Section 212.10, "Reasonably Available Control Technology for Major Facilities," which is proposed Subpart 212-3. Neither does this proposed rulemaking change the language of existing Section 212.12, "Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants," other than renumbering the section to Section 212-2.4 in line with the proposed new numbering.

This proposed action would modernize and streamline New York's regulatory scheme for air quality control of process operations and, in so doing, would strengthen the Department's ability to protect public health and the environment, reduce confusion regarding applicability of the regulation for the regulated community, and preserve the State's air resources and sensitive ecosystems.

A significant benefit from the proposed rule is that it continues to require facility owners to reduce the emissions of toxic air contaminants, including HTACs, statewide, including in rural areas. This requirement would be a positive benefit for the rural environment because a large majority of lakes and rivers in New York State have been classified as impaired by the NYS Department of Health for compounds such as mercury and PCBs.<sup>1</sup> The Department and the New York State Department of Health have both issued specific warnings advising that pregnant women and children should not consume any servings of specific fish species that are caught in 93 lakes and more than 265 miles of rivers in the State. The New York State Department of Health publication, "Health Advisory for Eating Sport Fish and Game", identifies many lakes and rivers where fish consumption has warnings due to high levels of some HTACs.<sup>2</sup> Source owners of existing facilities in rural areas may need to control certain process operations to reduce the burden on the environment. Facil-

ity owners requiring control under the current Part 212 would continue to be required to control emissions.

#### TYPES AND ESTIMATED NUMBER OF RURAL AREAS

The emissions limitations and permitting procedures for the new Subparts apply statewide and therefore to all facilities located in rural counties (less than 200,000 people) and towns (less than 150 people per square mile). The extent to which rural areas are affected would depend on the specific type(s) of emission sources located in the rural area. However, the proposed revisions are not anticipated to have any disproportional impacts on rural communities.

As indicated in the Regulatory Impact Statement costs analysis, Section 5(e) Tables 7 and 8, sources subject to the proposed Part 212 are spread throughout the regions, with the greatest numbers found in Regions 4 and 5, and the least found in Regions 1 and 3. Additionally, Saratoga County, population 219,607<sup>3</sup> contains the largest number of regulated sources (80), followed by Niagara County, population 216,469<sup>4</sup> and 38 sources. Schenectady County, population 154,727<sup>5</sup> and 35 sources, Warren County, population 65,707<sup>6</sup> and 24 sources, and Montgomery County, population 50,219<sup>7</sup> and 21 sources, are considered rural under the State Administrative Procedure Act and those facilities would also be subject to proposed Part 212. However, it is important to note that these facilities sited in rural areas would be regulated the same as facilities sited in non-rural areas.

#### REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

No additional recordkeeping, reporting, or other requirements would be imposed on local rural governments or facility owners that would be different from any other applicable individuals or corporations complying with New York State air pollution regulations. All process sources subject to this regulation would be required to report their emission rate potential and actual hourly emissions as well as document how this determination was made. All process sources subject to this regulation may be required to demonstrate compliance by submitting a Toxic Impact Assessment to the Department in order to demonstrate that emissions are at or below the appropriate emission limit; are in compliance with the NAAQS or short-term or annual guideline concentration; or have achieved the degree of air cleaning required through the installation of air pollution control.

#### COSTS

Actual costs to source owners depend entirely on the types of emissions produced at a facility and would be determined on a case-by-case basis. Compliance with the proposed Part 212 would involve a step-wise process for determining a whether a facility's predicted or actual annual emissions require additional reductions either through product substitution or control technology. Actual costs to a regulated facility depend upon its size and types of emissions produced at that facility and, as a result, must be determined on a case-by-case basis. Therefore, a cost analysis tailored exclusively to estimate costs for rural areas is impossible, as the types of regulated facilities in rural areas are as varied in their emissions as facilities across the state. However, the estimated cost for complex air dispersion modeling can range from \$2,500 to \$25,000 per facility and is dependent on the age of the facility and the amount of detailed work required. Additionally, a facility may incur no cost for this analysis if it utilizes free software that would be available from the Department or a nominal cost if a facility purchases more simple air dispersion modeling software, which ranges in price from \$400 to \$500 with yearly renewal costs. In evaluating the costs of product substitution, the Department has assessed not only the cost of the replacing one solvent for another, but also capital costs, energy differences, labor costs, waste disposal and quality control considerations.

In many instances, the Department has found that product substitution can ultimately save costs to a facility owner rather than cause them. The annualized cost of the various air pollution control equipment mandated to be installed at major sources and area sources, has cost estimates ranging from \$5,000 to \$200,000 per facility. The cost figures include the annualized purchase and installation costs, and operational costs of the air pollution control equipment over the projected lifetime of the equipment. Therefore, the exact cost to the regulated facility would vary given that compliance with this regulation would depend on the size of the air pollution emission source; if the emission source is new or existing (already has some type of air pollution control in place); if the facility owner or operator already employs environmental compliance staff to address state and federal air pollution regulations; or if the facility owner or operator needs to hire an environmental consultant to complete the work necessary to demonstrate compliance with the regulation. A detailed range of costs based on various control strategies can be found in the Regulatory Impact Statement. However, it does not appear that these proposed revisions would have disproportionate cost impacts on rural communities.

#### MINIMIZING ADVERSE IMPACTS

The objective of Part 212 is to reduce toxic air contaminants statewide. Toxic air contaminants are those pollutants that are known or suspected to cause cancer or other serious health effects, such as negative reproductive effects or birth defects, or to cause adverse environmental effects. Because

the proposed toxic air contaminant reduction requirements are applicable to sources statewide, no rural area would be affected disproportionately. Compliance with proposed Part 212 would involve a step-wise process for determining a whether a facility’s predicted or actual annual emissions require additional reductions either through product substitution or control technology, the actual costs of which would vary depending on a regulated facility’s size and types of regulated compounds emitted. For a detailed description of the step-wise process, please see the Regulatory Impact Statement. As a result, costs would be consistent and predictable across all sectors, thus establishing greater regulatory certainty.

The Department requires an evaluation of the potential air toxic contaminant impacts from known sources of air pollution through a combination of recordkeeping and reporting, operating practices, and the installation of air pollution control equipment or pollution prevention practices to reduce community concentrations of toxic air contaminants. In this manner, it hopes to achieve sufficient toxic air contaminant reductions that are protective of public health while minimizing the cost to businesses. The regulation provides all process sources of air pollution regardless of location with ways to assess and mitigate emissions in a step-wise, cost-effective manner that is tailored for each individual facility. There would be positive environmental impacts from the regulation in rural areas. Rural areas containing applicable sources, as well as rural areas downwind of such sources, would be subject to a decrease in toxic air contaminant emissions that would result in reduced ambient air exposures for all members of the community.

**RURAL AREA PARTICIPATION**

The Department held public information sessions to discuss the proposed Part 212 in Albany on November 12, 2013, Long Island City on October 30, 2013, and Buffalo on October 22, 2013.

The Department plans on holding public hearings during the proposal stage at various locations throughout New York State. Some of these locations would be convenient for persons from rural areas to participate. Additionally, there would be a public comment period in which interested parties who are unable to attend a public hearing can submit written comments on the proposed regulation.

<sup>1</sup> Chemicals in Sportfish and Game, New York State Department of Health - 2010-2011 Health Advisories, URL [http://www.health.ny.gov/environmental/outdoors/fish/health\\_advisories/publications.htm](http://www.health.ny.gov/environmental/outdoors/fish/health_advisories/publications.htm)

<sup>2</sup> Id.

<sup>3</sup> United States Census Bureau, State and County Quick Facts, Saratoga County, New York (available at <http://quickfacts.census.gov/qfd/states/36/36091.html>)

<sup>4</sup> United States Census Bureau, State and County Quick Facts, Niagara County, New York (available at <http://quickfacts.census.gov/qfd/states/36/36063.html>)

<sup>5</sup> United States Census Bureau, State and County Quick Facts, Schoenectady County, New York (available at <http://quickfacts.census.gov/qfd/states/36/36093.html>)

<sup>6</sup> United States Census Bureau, State and County Quick Facts, Warren County, New York (available at <http://quickfacts.census.gov/qfd/states/36/36113.html>)

<sup>7</sup> United States Census Bureau, State and County Quick Facts, Montgomery County, New York (available at <http://quickfacts.census.gov/qfd/states/36/36057.html>)

**Job Impact Statement**

**NATURE OF IMPACT**

The Department of Environmental Conservation (Department) is proposing to repeal and replace 6 NYCRR Part 212 (Part 212) to streamline and update its provisions, align those provisions with the Department’s permitting regulations, provide more regulatory certainty for the regulated community, and ensure public health and welfare. Currently, Part 212 regulates air emission sources associated with a process operation by establishing air pollution control requirements for the release of toxic air contaminants. This rulemaking proposes to: establish consistent terminology between Part 212 and 6 NYCRR Part 200 (Part 200) and 6 NYCRR Part 201 (Part 201); establish a Toxic- Best Available Control Technology (T-BACT) standard for toxic air contaminants; clarify the interaction between Part 212 and the National Emission Standards for Hazardous Air Pollutants (NESHAPs); offer a streamlined approach for demonstrating compliance with regulatory standards for air contaminants by adopting a mass emission rate option; replace the current Part 212 control requirement, which provides the Commissioner with discretion to establish the degree of required air cleaning, with a performance of air dispersion modeling analysis in order to demonstrate compliance with Department Guideline Concentrations or National Ambient Air Quality Standards (NAAQS); control High Toxicity Air Contaminants (HTACs) to the greatest extent possible; and generally reorganize and clarify Part 212. Aside

from renumbering and replacement of the term “Lower Orange County” with a list of regulated Orange County towns, this proposed rulemaking does not change the language of existing Section 212.10, “Reasonably Available Control Technology for Major Facilities,” which is proposed Subpart 212-3. Neither does this proposed rulemaking change the language of existing Section 212.12, “Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants,” other than renumbering the section to Section 212-2.4 in line with the proposed new numbering.

This proposed action would modernize and streamline New York’s regulatory scheme for air quality control of process operations and, in so doing, would strengthen the Department’s ability to protect public health and the environment, reduce confusion regarding applicability of the regulation for the regulated community, and preserve the State’s air resources and sensitive ecosystems.

The Department anticipates that Proposed Part 212 would cause no significant decrease in jobs, as costs to the regulated community should not change significantly from those costs already incurred under the existing Part 212. On the contrary, the proposed Part 212 creates more regulatory certainty, which allows for better calculation of a regulated entity’s future growth and subsequent job creation. Additionally, Part 212 may cause a nominal increase in independent job opportunities, as it creates a niche for self-employed consultants to advise regulated facilities on how to comply with the proposed regulation and how to best assess emission impacts from those regulated facilities and apply any necessary control technology.

**CATEGORIES AND NUMBERS AFFECTED**

To estimate the potential distribution of impacts, geographically and across industries, the Department developed a non-exclusive list of those emission sources that could be subject to the proposed Part 212. The Department compiled a list of emission sources rather than a list of permit holders because a single facility can hold a single permit, yet have multiple emission sources required to comply with the requirements of Part 212. This list was augmented by North American Industry Classification System/Standard Industrial Classification (NAICS/SIC) codes and descriptions. Examination of the list produced the following general considerations. As shown in Table 1 Industrial Divisions 28 (Chemicals and Allied Products) and 49 (Electric, Gas and Sanitary Services) had the highest number of emissions sources in the list and, therefore, have the highest probability of costs increases faced by entities in these Divisions.

Table 1:

Industrial Divisions with 20 or more Sources Subject to Proposed Changes to Part 212		
SIC Code	Description	# of Sources
28	Chemicals and Allied Products	138
49	Electric, Gas and Sanitary Services	63
34	Fabricated Metal Products, Except Machinery & Transport Equipment	53
33	Primary Metal Industries	43
30	Rubber and Miscellaneous Plastic Products	38
26	Paper and Allied Products	34
32	Stone, Clay, Glass, and Concrete Products	34
80	Health Services	29
36	Electronic, Electrical Equipment & Components, Except Computer Equipment	23
35	Industrial and Commercial Machinery and Computer Equipment	22
38	Mesr/Anlyz/Control Instruments; Photo/Med/Opt Gds; Watches/Clocks	22

Table 1 shows the types of facilities that appear in the DEC permit list most frequently. It gives information about which sectors would bear the burden of the potential cost changes in terms of numbers of sources. While all manufacturing industries may be affected by proposed Part 212, the majority of the affected emission sources are already similarly affected by the existing Part 212. Such emissions sources may witness nominal regulatory changes. These categories and numbers of affected regulated sources are discussed at length in section 5 of the Regulatory Impact Statement. Because the proposed regulation is designed to offer consistency with federal regulations, it should not have a negative effect on the growth of manufacturing.

**REGIONS OF ADVERSE IMPACT**

The proposed regulation would apply to manufacturing industries across the state, large and small, rural, suburban, and urban. Whereas the State’s largest manufacturing is located in Western New York and the St.

Lawrence area due to access to hydro electricity power, many smaller industries are located throughout New York. Regardless of regional location, however, the proposed regulation should not have any regional-specific impacts with respect to increase or decrease of jobs.

#### MINIMIZING ADVERSE IMPACT

The impact to job growth due to this proposed regulation is expected to be minimal. The proposed regulation is designed to offer consistency and regulatory assurance for the regulated community while offering emission reductions of the most toxic air contaminants. Consistency and regulatory assurance is important in all regulatory actions. It is these qualities that allow industry to make calculated advances for future growth and job creation. The proposed rule is designed to minimize any redundant air dispersion modeling analyses. However, in instances where air dispersion modeling is necessary, the Department maintains free modeling software on the State's website for applicants to conduct modeling when appropriate so as to try to eliminate expensive consulting fees.

The proposed regulation would also work in conjunction with Part 201-9 for identifying toxic air contaminants to establish continuity between types of permits issued to regulated sources and regulatory requirements. This aids the regulated community in recognizing the Department's priorities when it comes to the emissions of non-criteria pollutants. The proposed rule also ensures consistency with the federal NESHAPs and New Source Performance Standards regulations for ease of compliance with both state and federal laws and regulations for the regulated New York community.

#### SELF-EMPLOYMENT OPPORTUNITIES

There would be an opportunity for self-employed consultants to advise facilities on how best to comply with the proposed regulation and how to assess emission impacts from the regulated facilities. The proposed regulation is not expected to have any measurable negative impact on opportunities for self-employment and may, in fact, provide opportunities for self-employment for individuals who have the proper educational and technical background.

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## Department of Financial Services

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### NOTICE OF ADOPTION

#### Mandatory Underwriting Inspection Requirement for Private Passenger Automobiles

**I.D. No.** DFS-36-14-00015-A

**Filing No.** 1064

**Filing Date:** 2014-12-16

**Effective Date:** 2015-04-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Part 67 (Regulation 79) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 3411, 5303 and art. 53

**Subject:** Mandatory Underwriting Inspection Requirement for Private Passenger Automobiles.

**Purpose:** Revise requirements regarding the inspection of private passenger automobiles for physical damage coverage.

**Substance of final rule:** Section 67.1 amends the definitions to clarify the types of vehicles subject to the inspection requirement and establishes definitions for a new, unused automobile, durable medium, and New automobile dealer.

Section 67.3(b)(3) is amended to reduce the minimum time frame from 4 years to 2 years for an insured to be eligible for an inspection waiver for an additional and/or replacement automobile when the insured has been continuously insured for automobile insurance, with the same insurer or another insurer under common control or ownership.

Section 67.3(b)(11) is added to allow an inspection waiver when an insured under a new policy had the automobile continuously insured for physical damage coverage by a previous insurer that inspected the automobile within the prior two years, or ownership.

Section 67.4(b) is amended to increase the inspection deferral period from 5 to 14 calendar days.

Section 67.5 is amended to recognize the use of new technology (digital photography, electronic storage and retrieval of inspection reports and photographs, use of email).

Section 67.7(c)(1)(i) is amended to expand the current renewal inspec-

tion notice requirement from 33 days prior to renewal date to at least 45 days but no more than 60 calendar days prior to the annual policy renewal date in order to track with Insurance Law section 3425.

The proposed rule also includes non-substantive technical changes designed to clarify various provisions in the regulation.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 67.3(b)(6), 67.4(b), 67.5(a) and 67.12 FORM A.

**Text of rule and any required statements and analyses may be obtained from:** Camielle Barclay, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5299, email: camielle.barclay@dfs.ny.gov

#### Revised Regulatory Impact Statement

1. Statutory authority: Sections 202 and 302 of the Financial Services Law, and Sections 301, 3411, 5303, and Article 53 of the Insurance Law.

Financial Services Law sections 202 and 302 and Insurance Law section 301 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law section 3411 requires insurers to inspect private passenger automobiles insured for physical damage coverage except as provided for in a regulation prescribed by the Superintendent.

Article 53 authorizes the Superintendent to approve plans for providing motor vehicle insurance coverage to persons who are unable to obtain coverage in the voluntary insurance market. The New York Automobile Insurance Plan ("NYAIP"), also commonly known as the Assigned Risk Plan, is the mechanism for providing such coverage. Insurance Law section 5303 specifies coverages that are available through the NYAIP, and subjects those coverages to the requirements of Insurance Law section 3411 as well as other provisions in the Insurance Law.

2. Legislative objectives: Insurance Law section 3411 directs the Superintendent to promulgate regulations implementing the section, which, among other things, requires insurers to inspect private passenger automobiles ("automobiles") when issuing physical damage coverage on the automobiles.

3. Needs and benefits: Insurance Law section 3411 prescribes a framework when insurers provide physical damage coverage for automobiles and the duties of insurers and insureds with respect to inspections of automobiles. Inspections of automobiles have been mandatory since 1977 in order to combat insurance fraud, and only under limited circumstances has the current rule permitted insurers to waive or defer inspections. However, with advances in technology to combat automobile physical damage insurance fraud, certain provisions of the current rule have been rendered obsolete or unduly burdensome to insurers and insureds. This proposed rule updates the regulation, which should reduce unnecessary expenses to insurers and consumers, while maintaining necessary requirements to combat fraud. The proposed rule also clarifies various provisions of the regulation, including the types of automobiles subject to the inspection requirement, and expands the optional inspection waivers available to insurers.

4. Costs: The proposed rule imposes no compliance costs on state or local governments. The proposed rule should reduce costs to insurers overall for the administration, processing of paperwork, operations and underwriting of automobile physical damage insurance. These savings ultimately should be passed on to consumers.

5. Local government mandates: None.

6. Paperwork: The proposed rule does not generate any additional paperwork, other than a revised Plan of Operation that insurers would file with the Department if insurers chose to incorporate the optional waivers in the proposed rule. However, the rule reduces the paperwork requirements on an insurer by permitting an insurer to use separate entities such as CARCO Group, Inc., to maintain a central repository of its physical damage inspection reports.

7. Duplication: None.

8. Alternatives: Recognizing advances in technology and measures to reduce automobile insurance fraud, the Superintendent submitted an outreach draft to various stakeholders for comment. Some of the more significant comments that the Superintendent considered are set forth below.

Stakeholders recommended adding a number of optional waivers to the inspection requirement, including waivers for certain types of insureds, where the insured has other types of coverage with the insurer, and when the vehicle is at least three years old rather than seven years, as the current rule provides. The Superintendent considered those optional waivers and concluded that waiving the inspection requirement under those circumstances may present improper inducement and discrimination concerns, and could lead to increased instances of fraud. Other suggestions for optional waivers already were addressed in the Department's amendments to the current rule.

The Superintendent also considered a suggestion that the rule no longer

should require inspection reports to settle physical damage claims because to do so is counter-productive and would delay settlement. The Superintendent rejected this suggestion, concluding that using an inspection report in settling a physical damage claim is necessary to protect both the consumer and the insurer because the report confirms the condition of the insured's automobile, thus deterring fraud, which in turn may lower insurance rates.

Stakeholders also recommended that the five-day inspection deferral period be expanded to 10-14 days. The Superintendent considered this alternative and agreed that a 10-day deferral period would give insureds at least one full weekend in which to comply with the inspection requirements. However, the Superintendent originally rejected any time longer than 10 days on the ground that a longer time could lead to increased incidence of fraud.

All interested parties who subsequently submitted comments to the proposed amendments regarding the Department's increase in the deferral time period for inspections after the effective date of the policy supported that change, but continued to recommend that the deferral period be longer than 10 days to provide more flexibility to consumers trying to obtain inspections.

Although the Department was originally concerned that a deferral period longer than 10 days would lead to increased incidence of fraud, the Department has reconsidered that position. Advancements in the use of technology mean that insurers now get almost instantaneous reports from car inspection sites, whereas it used to take several days to mail the reports. Because the reports get into the hands of the insurers sooner, there is no substantive difference between the 10 days plus mailing that the Department was considering as the period and 14 days with electronic reports. Accordingly, the Department agrees with the commenters and will increase the deferral period to 14 days as some commenters suggested. Fourteen days will allow more time for consumers to obtain inspections without having an adverse impact on other anti-fraud measures in the regulation.

9. Federal standards: None.

10. Compliance schedule: There is no compliance requirement placed on insurers because changes made to the regulation are optional and insurers could maintain their existing procedures. Insurers that opt to adopt those optional changes would be able to do so as soon as they file revised Plans of Operation with the Department.

#### **Revised Regulatory Flexibility Analysis**

The Department of Financial Services (the "Department") made a non-substantive change to section 67.3(b)(6) in order to add language to conform to other provisions in the regulation. In response to a public comment received, the Department also has made a non-substantive change to section 67.4(b) to change the deferral of inspection from 10 calendar days to 14 calendar days for reasons specified in the Revised Regulatory Impact Statement. The Department also made a non-substantive language change in section 67.5(a), and deleted "motorcycle" from Form A because a motorcycle is not a "private passenger automobile" under the regulation. Because these changes have no effect on the last published Regulatory Flexibility Analysis for Small Businesses and Local Governments, it is not necessary to revise the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

#### **Revised Rural Area Flexibility Analysis**

The Department of Financial Services (the "Department") made a non-substantive change to section 67.3(b)(6) in order to add language to conform to other provisions in the regulation. In response to a public comment received, the Department also has made a non-substantive change to section 67.4(b) to change the deferral of inspection from 10 calendar days to 14 calendar days for reasons specified in the Revised Regulatory Impact Statement. The Department also made a non-substantive language change in section 67.5(a), and deleted "motorcycle" from Form A because a motorcycle is not a "private passenger automobile" under the regulation. Because these changes have no effect on the last published Rural Area Flexibility Analysis, it is not necessary to revise the previously published Rural Area Flexibility Analysis.

#### **Revised Job Impact Statement**

The Department of Financial Services (the "Department") made a non-substantive change to section 67.3(b)(6) in order to add language to conform to other provisions in the regulation. In response to a public comment received, the Department also has made a non-substantive change to section 67.4(b) to change the deferral of inspection from 10 calendar days to 14 calendar days for reasons specified in the Revised Regulatory Impact Statement. The Department also made a non-substantive language change in section 67.5(a), and deleted "motorcycle" from Form A because a motorcycle is not a "private passenger automobile" under the regulation. Because these changes have no effect on the last published Job Impact

Statement, it is not necessary to revise the previously published Job Impact Statement.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2017, which is no later than the 3rd year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The Department received comments from 11 interested parties in response to its publication of the proposed Fifth Amendment to 11 NYCRR 67 (Insurance Regulation 79) in the New York State Register. The Department received comments from the following entities:

- Property/casualty insurers;
- Trade associations comprised of New York State automobile insurers;
- An insurance agency;
- Trade associations comprised of insurance agents in New York State;
- A member of the New York State Assembly; and
- A motor vehicle inspection company.

Summaries of the comments on the proposal and the Department's responses thereto are as follows:

##### **General comments**

The motor vehicle inspection company strongly supports this proposed rule and asserts that pre-insurance physical damage inspections should remain mandatory because those inspections continue to serve as a valuable tool in combating systemic vehicle thefts by organized stolen car rings. One insurance agent trade association supports the Department's proposed changes to the regulation, and suggests additional changes for consideration.

However, insurers and another agent trade association generally do not support any statute or regulation establishing mandatory underwriting inspection requirements because of advances in technology to combat automobile insurance fraud and theft, and even question the need for the mandatory photo inspection of motor vehicles, contending that national databases such as CARFAX® and the National Insurance Crime Bureau store vehicle identification numbers and motor vehicle claims information that can be used to determine whether a motor vehicle to be insured actually exists and whether it has any previous physical damage. However, Insurance Law § 3411 requires that an insurer conduct an inspection of an automobile prior to issuing coverage for physical damage and Insurance Regulation 79 implements that statutory mandate. Moreover, the Department disagrees that there is no need for the mandatory inspection of motor vehicles; rather, the regulation is a necessary tool to aid in combating insurance fraud and abuse and organized automobile theft rings in the state. The Department recognizes, however, that in light of advances in technology to combat automobile physical damage insurance fraud, certain provisions of the current rule have become obsolete or unduly burdensome to insurers and insureds. The proposed rule modifies those provisions without compromising the proven effectiveness of photo inspections of motor vehicles in reducing fraud and abuse. Comments on specific parts of the proposed rule are discussed below.

##### **Proposed 11 NYCRR 67.1 ("Definitions")**

###### **Comment**

One insurer trade association recommended that the definition of "private passenger automobile" in § 67.1(a) be amended to exclude private passenger vehicles primarily used for commercial purposes or that are insured under commercial vehicle policies because fraud involving those vehicles is "highly uncommon." Alternatively, the association recommended that all references to "private passenger" be removed from the regulation because the term implies that the rule may not apply to commercial vehicles. The association also asserted that applying the Vehicle and Traffic Law definition to "farm vehicle" may be confusing because insurers and agents may not be able to determine which vehicles fall within that definition, and suggested that "farm vehicle" should be defined as "a vehicle predominantly used for farm purposes."

###### **Department's Response**

The Department is not persuaded that there is an insignificant amount of fraud relating to vehicles insured under commercial vehicle policies, and the association has proffered no evidence that this is the case.

The regulation uses the term "private passenger" automobile because that is the term used in § 3411. The Department also believes that the definitions of "private passenger" and "farm vehicle" in the regulation and the VTL are clear and unambiguous.

###### **Comments**

One insurer recommended that 11 NYCRR § 67.1(g) be clarified to address whether a licensed repair shop's or an authorized representative's visual inspection, along with photographs from an insured satisfy the inspection requirement for out-of-state vehicles. The insurer suggested waiving the inspection requirement for out-of-state vehicles or permitting only a visual inspection. The insurer also recommended that § 67.1(j) be amended to permit an insurer to manually reproduce an inspection report

rather than have to produce an exact copy of the report as the provision requires, because “systems limitations” may not permit the reproduction of exact copies.

Another insurer suggested that the rule be clarified to not require insurers to use a particular motor vehicle inspection service, and that an insurer be permitted to designate an agent or staff member in the agent’s office to conduct inspections.

#### Department’s Responses

11 NYCRR § 67.1(g) was amended to eliminate the licensing or registration requirement for motor vehicle inspection companies because the Department performs no such licensing or registration. The proposed rule only requires that the individual or entity selected to perform motor vehicle inspections be “properly qualified” to do so, and does not require an insurer to use any particular motor vehicle inspection service.

The Department is not persuaded by the insurer’s claim that it is more difficult to reproduce an exact copy of an inspection report, given today’s advances in technology, than it is to manually copy information from an inspection report.

Proposed 11 NYCRR 67.2 (“Mandatory inspection requirements for private passenger automobiles”)

#### Comment

One insurer asserted that this provision could have an adverse impact on consumers by delaying new coverage or amending existing coverage until a vehicle is inspected. According to the insurer, such a delay also could have “adverse consequences under the state’s “financial responsibility laws for those making a legitimate request for insurance,” and the insurer suggested that more waivers of the mandatory inspection requirement would minimize those consequences. The insurer also questioned whether this provision would adversely impact the practice that when a vehicle is added as a replacement for a covered vehicle or a new vehicle, coverage under an existing policy is extended for a brief period until a new policy is issued.

#### Department’s Response

The Department does not find the insurer’s comments compelling enough to warrant additional waivers of the mandatory inspection requirement. With respect to the “brief” extension of coverage to a replacement or new vehicle to be added to an existing policy, § 67.4(i)(1) provides a limited exception to § 67.2 whereby an insurer may extend coverage to a replacement vehicle for five calendar days from the date the insured acquired the replacement vehicle. Lastly, since the inspection requirements do not impact liability insurance coverage, the Department does not understand how they could have adverse consequences under state financial responsibility laws.

#### Comment

One insurer trade association sought clarification regarding § 67.2 and its relationship to § 67.4(i)(1), particularly with respect to the notice that an insured is required to provide its insurer when it obtains a new vehicle, and regarding why § 67.4(i)(1) only applies to replacement vehicles and not additional vehicles.

#### Department’s Response

The proposed regulation is clear that the notice requirement in § 67.4 shall commence at the conclusion of the five-calendar-day period with regard to the limited exception.

11 NYCRR 67.4(i)(1) provides a limited exception to the mandatory inspection requirement set forth in § 67.2 when the named insured acquires an automobile that replaces an automobile currently insured on the policy and has yet to inform the insurer of the acquisition of the replacement vehicle. This limited exception exists in the current regulation and the only change being made is the duration of the automatic extension of coverage. The Department has approved policy form filings that provide such automatic extension of coverage to a replacement vehicle.

Proposed 11 NYCRR 67.3 (“Waiver of the mandatory inspection requirement”)

#### Comments

One insurer proffered several comments regarding this provision. The insurer recommended (1) that the waiver be applied to vehicles more than four years old rather than at least seven years old, as proposed in the rule; (2) that the current requirement that the age of the vehicle be calculated as the model year of the vehicle as of January 1 remain unchanged, rather than having the age be calculated as of the effective date of the coverage as the Department proposed, because that proposal would result in unduly burdensome costs to the insurer; (3) that the waiver be applied to six months of continuous coverage, just as in New Jersey, which has amended its waiver provision, rather than to two years as the Department proposed; (4) that the requirement that an insured must agree to the transfer of coverage in order to comply with the waiver be eliminated because this requirement is “unnecessary” to the inspection process; (5) that the two-year continuous coverage without a lapse requirement for the waiver be eliminated, or alternatively, that “without a lapse” be eliminated as unnecessary; (6) that the requirement that the inspection waiver be based on

underwriting criteria be eliminated as unnecessary; (7) the elimination of the provision mandating that coverage not be suspended during the initial policy term because the insured failed to submit the requisite documents, and the requirement that if an insured fails to produce the documents prescribed in § 67.3, then the insured must have the vehicle inspected, because they would result in “programming” costs to insurers; (8) that the insurer requesting either a copy of the window sticker/advanced dealer shipping notice or a copy of the bill of sale should be sufficient rather than both as the rule requires; and (9) that the insured should be required to send a copy of the window sticker and bill of sale within a prescribed time rather than having until its anniversary coverage renewal date as the rule proposed because this proposal would result in “programming costs” to the insurer.

#### Department’s Responses

The Department does not find any of the insurer’s comments compelling. The Department believes that waiving the inspection requirement after two years of continuous coverage without a lapse is a reasonable compromise of the current four-year requirement to establish a trustworthy relationship between an insurer and its insured. The insurer has proffered no evidence that six months of coverage will result in a similar reduction in potential fraud. Also, New Jersey has a four-year continuous coverage requirement and not a shorter time period as the insurer stated. The inspection waiver being subject to underwriting criteria is necessary to ensure that insurers are fairly and consistently applying waivers of inspection to all their insureds. The Department believes it is necessary for the insurer to receive both the window sticker/advance dealer shipping notice and a copy of the bill of sale, because these documents contain different pertinent information. The rule as proposed provides a clear time frame for the insurer to obtain these required documents for applying the waiver of the inspection of a new automobile. If the documents are not received at least 60 days prior to the anniversary renewal, the insurer will need to require the mandatory inspection of the vehicle to continue the physical damage coverage upon renewal.

Finally, the Department is not persuaded that any programming costs incurred to implement this provision would be unduly burdensome.

#### Comment

The vehicle inspection company stated that it did not oppose the proposed reduction from a four-year time period to a two-year time period that the insured must be continuously insured before an insurer can waive the inspection requirement, but recommended changing the time period to three years based on “feedback from law enforcement.”

#### Department’s Response

The Department believes that at least two years of continuous coverage is sufficient to provide additional flexibility to insurers to waive inspections when warranted while safeguarding against insurance fraud and abuse. The motor vehicle inspection company has not provided any empirical data or written statements from “law enforcement” that the Department’s proposal would have a deleterious effect.

#### Comment

One trade organization representing insurers recommended that the provision requiring consent from the insured before coverage is transferred should be eliminated because a named insured “does not commonly affirmatively consent” to the transfer, but is only advised by its agent of the transfer of coverage. One insurer also asserted that this provision should be eliminated because it is irrelevant to the inspection process.

#### Department’s Response

The Insurance Law does not permit any automatic transfers of motor vehicle insurance coverage to another insurer without issuance of an appropriate termination notice by the current insurer unless the policy has been replaced. A replacement policy may not be effected without some form of consent from the insured. This may be done affirmatively or presumptively with appropriate and timely notification provided to the insured but subject to the insured’s rejection of the move. The Department is not compelled to revise the current provision as it exists in the regulation.

#### Comments

The motor vehicle inspection company recommended that the rule should be amended to make payment of a physical damage claim dependent on whether the insurer obtained proof of the prior inspection from the previous insurer as required for specific optional waivers set forth in § 67.3(b) in order to minimize potential fraud.

Insurers and their trade associations asserted that requiring inspections as a condition of renewal is largely unnecessary, would only increase costs and burden consumers, and would not deter fraudulent activity because an insured who intends to commit automobile insurance fraud likely would do so within the initial policy year. Therefore, they stated, these provisions should be deleted from the regulation.

#### Department’s Response

With respect to the motor vehicle inspection company’s recommendation, it is not appropriate for an insured to not receive payment of a valid

physical damage claim solely due to a previous insurer not providing the inspection documents when the insured vehicle had actually been inspected as required by those specific optional waivers. Additionally, the Department does not find compelling the arguments of the insurers and their trade associations that inspections as a condition of renewal will not serve to deter fraud. Those commentators have proffered no evidence that fraudulent activity only occurs during the initial policy year, and the Department finds it implausible that no insured who intends to commit insurance fraud would attempt to do so during a renewal period.

**Comment**

An agent trade association expressed concerns with the requirement set forth in 11 NYCRR 67.3(b)(7), (8) and (10) that in order to waive the mandatory inspection requirement, a vehicle must be physically inspected by the previous insurer, particularly in the case where the vehicle is new or has not been sold or transferred.

**Department's Response**

The Department will take under consideration the applicability of these waivers when the vehicle was originally new and the inspection was waived by the previous insurer pursuant to § 67.3(b)(2), but will not delay implementation of the proposed amendment at this time.

Proposed 11 NYCRR 67.4 ("Deferral of the mandatory inspection requirement")

**Comment**

When the Department sought outreach comments prior to proposing the amendments, stakeholders recommended that the five-day inspection deferral period in 11 NYCRR 67.4(b) be expanded to 10-14 days. The Superintendent considered this alternative and agreed that a 10-day deferral period would give insureds at least one full weekend in which to comply with the inspection requirements. However, the Superintendent at that time rejected any time longer than 10 days on the ground that a longer time might lead to increased incidence of fraud. All interested parties who submitted comments to the proposed amendments regarding the Department's increase in the deferral time period for inspections after the effective date of the policy supported that change but continued to recommend that the deferral period be longer than 10 days to provide more flexibility to consumers trying to obtain inspections.

**Department's Response**

Although the Department was originally concerned that a deferral period longer than 10 days would lead to increased incidence of fraud, the Department has reconsidered that position. Advancements in the use of technology mean that insurers now get almost instantaneous reports from car inspection sites, whereas it used to take several days to mail the reports. Because the reports get into the hands of the insurers sooner, there is no substantive difference between the 10 days plus mailing that the Department was considering as the period and 14 days with electronic reports. Accordingly, the Department agrees with the commenters and will increase the deferral period to 14 days as some commenters suggested. Fourteen days will allow more time for consumers to obtain inspections without having an adverse impact on other anti-fraud measures in the regulation.

**Comment**

Insurers and their trade associations recommended that the notification of mandatory inspection requirements prescribed in 11 NYCRR 67.4(f) et. seq. should be deleted as impractical and that an online transaction should serve as an insured's consent to receive notice electronically.

**Department's Response**

As the Department has expressed, pre-insurance automobile inspections are critical to thwarting insurance fraud and abuse. These notification of inspection provisions are necessary to ensure that consumers are made aware of the mandatory automobile inspections. The Department does not find it an undue burden, especially with advances in technology, for an insurer to maintain a record of the insurer's representative who notified the insured in person or by telephone of the inspection requirement and possible inspection locations, or for an insurer to format its online database to ensure that an insured acknowledges the notice of mandatory inspection before completing its transaction.

Proposed 11 NYCRR 67.5 ("Standards for inspections")

**Comment**

One insurer suggested that § 67.5(a)(1) and (2) pertaining to inspection times and locations be deleted or waived because there may not be a facility convenient to an insured on a Sunday and there may be instances where an insured purchased a vehicle in a state with no inspection requirement or no location within 50 miles of the insured, and the insured may not return to New York State before the inspection deferral period expires.

**Department's Response**

The Department is not persuaded by the insurer's reasons for deleting or waiving those provisions. These provisions were amended to provide the widest possible latitude for insurers and consumers to comply with the inspection requirement prescribed in Insurance Law § 3411 and Insurance Regulation 79.

**Comment**

An insurer expressed concerns with the provision in § 67.5(e)(3) that requires an insurer to send a copy of the inspection report to the insured within seven calendar days of the inspection, if the person presenting the vehicle for inspection was not the insured.

**Department's Response**

This amendment will ensure that the insured receives a copy of the inspection report, and the Department believes that such instances will be infrequent and that insurers will not incur any unduly burdensome costs to comply with this requirement.

Proposed 11 NYCRR 67.6 ("Standards for suspension of private passenger automobile physical damage insurance")

**Comment**

One insurer questioned why § 67.6(a) was amended to state that the automobile should be made "available" rather than to explain how the inspection should be conducted as set forth in the current regulation.

**Department's Response**

This amendment was made to address the concern that an insured should not be penalized for not complying with the mandatory inspection requirement because the inspection facility was unable to conduct the inspection at the time the vehicle was made available.

**Comment**

One insurer questioned the need to provide an insured with a Confirmation of Suspension of Physical Damage Coverage form for failing to comply with the mandatory inspection requirement because, when coverage is suspended, the insurer sends the insured an endorsement policy declaration page that shows removal of coverage.

**Department's Response**

The prescribed Confirmation of Suspension of Physical Damage Coverage form is necessary to specifically notify an insured that coverage has been suspended for failure to comply with the mandatory inspection requirement. A policy declaration page does not specifically alert the insured of this suspension but simply informs the insured that the coverage is no longer part of the policy, along with providing other information regarding the policy.

Proposed 11 NYCRR 67.8 ("Standards for inspection by NYAIP")

**Comment**

A trade association representing insurers recommended that § 67.8(c) be amended to include the use of a form substantially equivalent to the prescribed Automobile Insurance Inspection Report (Form A).

**Department's Response**

Insurance Law § 3411(h) requires that the inspection be recorded on a form prescribed by the Superintendent, and that is Form A.

Proposed 11 NYCRR 67.9 ("Required Amendatory Endorsements")

**Comment**

One insurer objected to the deletion of current § 67.9(d), which pertains to the New York mandatory automobile repairs endorsement for physical damage, because the insurer may require a completed Certification of Automobile Repairs.

**Department's Response**

This provision was removed from Insurance Regulation 79 because it pertains to endorsements and is unrelated to mandatory inspection requirements. This provision may be found at 11 NYCRR 216.12 (Insurance Regulation 64).

Proposed 11 NYCRR 67.11 ("Inspection report central repository")

**Comments**

An insurer asked whether there is any record-keeping requirement should an insurer elect to maintain inspection records in a central repository pursuant to 11 NYCRR 67.11.

Another insurer sought clarification as to whether this provision precludes an insurer from maintaining an inspection in its own repository in addition to a central repository.

**Department's Responses**

All inspection records, regardless of where maintained, are subject to the record retention requirements prescribed in § 67.5(e)(1) and 11 NYCRR 243 (Insurance Regulation 152), and the insurer is responsible for ensuring that the records are kept in accordance with such requirements. See 11 NYCRR 243.2(d). Nothing in the proposed rule, however, precludes an insurer from maintaining its inspection records in its own repository.

Proposed 11 NYCRR 67.12 ("Forms")

**Comments**

One insurer suggested that the Insurance Inspection Report (NYS APD FORM A) be amended to include other accessories and optional equipment. Another insurer suggested removing "motorcycle" from the Inspection Report since a motorcycle is not a "private passenger automobile" under the regulation.

**Department's Responses**

Form A contains an "Other" section to include accessories and optional equipment that are not specified on the form. The Department agrees with

the technical change to remove “motorcycle” from Form A. The form has been amended to reflect that change.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Independent Dispute Resolution for Emergency Services and Surprise Bills

**I.D. No.** DFS-52-14-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Addition of Part 200 to Title 23 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 301, 302 and art. 6; Insurance Law, section 301; and L. 2014, ch. 60, Part H

**Subject:** Independent Dispute Resolution for Emergency Services and Surprise Bills.

**Purpose:** To establish a dispute resolution process and standards for that process.

**Substance of proposed rule (Full text is posted at the following State website: [dfs.ny.gov](http://dfs.ny.gov)):** Section 200.0 is the preamble.

Section 200.1 describes the applicability of the regulation and states that the regulation is applicable to health care services provided in New York State.

Section 200.2 is the definitions.

Section 200.3 establishes the independent dispute resolution entity (IDRE) certification requirements. IDREs apply for certification to the superintendent and must demonstrate that they are able to review disputes involving payment for emergency services and surprise bills. IDREs must ensure that reviews are completed in the required timeframes, and must have a network of reviewers, including physicians.

Section 200.4 details prohibited conflicts of interest. IDRE and IDRE reviewers may not have a prohibited affiliation with a health care plan, provider, facility, developer of a health care service or patient involved in the dispute.

Section 200.5 details the responsibilities of health care plans for disputes regarding emergency services and surprise bills. Health care plans must pay the claim and may attempt to negotiate the amount. Health care plans must provide the insured with notice that the insured shall incur no greater out-of-pocket costs for the services than the insured would have incurred with a participating physician or health care provider. Health care plans are also required to provide information on their websites about surprise bills.

Section 200.6 details the responsibilities of non-participating physicians and non-participating referred health care providers for disputes regarding emergency services and surprise bills. Non-participating physicians and non-participating referred health care providers must hold insured patients that complete an assignment of benefits form harmless for surprise bills. Non-participating physicians must also include a claim form and an assignment of benefits form with a bill to an insured.

Section 200.7 establishes the process to submit disputes regarding emergency services or surprise bills. Health care plans, non-participating physicians, non-participating referred health care providers and patients may submit disputes involving payment for emergency services and surprise bills to an IDRE. The parties must complete an application in the form and manner determined by the superintendent and the parties must provide information about the dispute.

Section 200.8 establishes the responsibilities of an IDRE. Within three business days of receipt of an application submitted by a health care plan, non-participating physician, non-participating referred health care provider or a patient, an IDRE shall screen the application for any conflicts of interest, eligibility and request any additional information. If the requested information is not received within five business days, the IDRE shall make a determination based on the information available to the IDRE. If the IDRE determines, in a case involving a health care plan, based on the health care plan’s payment and the non-participating physician’s or non-participating referred health care provider’s fee, that a settlement between the health care plan and the non-participating physician or non-participating referred health care provider is reasonably likely, or that both the health care plan’s payment and the non-participating physician’s or non-participating referred health care provider’s fee represent unreasonable extremes, the IDRE may direct both parties to attempt a good faith negotiation for settlement. The IDRE shall have the dispute reviewed by a neutral and impartial reviewer with training and experience in health care billing, reimbursement, and usual and customary charges. All determinations shall be made in consultation with a neutral and impartial licensed reviewing physician in active practice in the same or

similar specialty as the physician providing the service that is subject to the dispute. To the extent practicable, the reviewing physician shall be licensed in this State. An IDRE shall make a determination within 30 days of receiving the request for the dispute resolution.

Section 200.9 establishes IDRE record retention and compliance. An IDRE shall retain case records in accordance with 11 NYCRR 243 (Insurance Regulation 152) for audit and examination for a period of six years from the date of the IDRE’s determination. An IDRE shall provide monthly reports to the superintendent or any information as required or requested by the superintendent within two business days or such other period acceptable to the superintendent.

Section 200.10 establishes payment responsibility for the IDRE. If an IDRE determines the health care plan’s payment is reasonable, payment for the dispute resolution process shall be the responsibility of the non-participating physician or as applicable, non-participating referred health care provider. If an IDRE determines the non-participating physician’s or non-participating referred health care provider’s fee is reasonable, payment for the dispute resolution process shall be the responsibility of the health care plan. If good faith negotiations directed by the IDRE results in a settlement between the health care plan and the non-participating physician or non-participating referred health care provider, the health care plan and the non-participating physician or non-participating referred health care provider shall evenly divide and share the prorated cost for dispute resolution. For disputes that are rejected as ineligible or due to the requesting non-participating physician, non-participating referred health care provider or health care plan’s failure to submit information, an IDRE may charge an application processing fee, which shall be the responsibility of the requesting physician, health care provider or health care plan.

**Text of proposed rule and any required statements and analyses may be obtained from:** Colleen Rumsey, New York State Department of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 474-0154, email: [colleen.rumsey@dfs.ny.gov](mailto:colleen.rumsey@dfs.ny.gov)

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### Regulatory Impact Statement

1. Statutory authority: The Superintendent’s authority for the promulgation of 23 NYCRR 200 derives from Sections 202, 301, 302 and Article 6 of the Financial Services Law; Section 301 of the Insurance Law.

Section 202 of the Financial Services Law establishes the office of the Superintendent and designates the Superintendent as the head of the Department of Financial Services (“Department”).

Section 301 of the Financial Services Law authorizes the Superintendent of Financial Services (“Superintendent”) to take such action as the Superintendent deems necessary to protect and educate users of financial products and services.

Section 302 of the Financial Services Law and Section 301 of the Insurance Law, in relevant part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Insurance Law, the Banking Law, the Financial Services Law or any other law of this state and to prescribe regulations interpreting the Insurance Law.

Article 6 of the Financial Services Law establishes an independent dispute resolution (“IDR”) process through which a dispute involving a bill for emergency services or a surprise bill may be resolved. This law grants the Superintendent the power to certify entities performing the IDR and authorizes the Superintendent to promulgate regulations establishing standards for the IDR process.

2. Legislative objectives: In 2012, the Department released “An Unwelcome Surprise,” a report detailing the issues that lead to consumers receiving unexpected medical bills from out-of-network providers. The report stated that unexpected and, sometimes, excessive medical bills from out-of-network providers contribute to the growing problem of consumer medical debt, which continues to be a significant cause of personal bankruptcy. The report found that consumers have experienced surprise bills when they do everything they can to stay in-network, yet receive a bill from a non-participating provider. The report also found that there are often high and unexpected bills for emergency care. Chapter 60 of the Laws of 2014 added a new Article 6 to the Financial Services Law to address this problem. Article 6 provides that consumers must be held harmless for out-of-network emergency bills and surprise bills, and directs the provider and the health plan work out payment for these bills. Article 6 establishes an IDR process by which a dispute involving a bill for emergency services or a surprise bill may be resolved. The statute also gives the Superintendent the authority to grant and revoke certifications of independent dispute resolution entities (“IDREs”) and to adopt rules necessary in order to implement the IDR process.

3. Needs and benefits: Article 6 establishes an IDR process by which a

dispute for a bill for emergency services or a surprise bill may be resolved. This rule is necessary in order to implement the IDR process required under the statute.

This rule details certification requirements for IDREs, and requires each proposed IDRE to demonstrate that it meets these requirements. The rule prohibits a proposed IDRE and its reviewers from having affiliations with entities involved in the dispute because of a potential conflict of interest.

The rule sets forth the responsibilities of health care plans, providers, patients and IDREs in relation to the IDR process and details the process to submit disputes regarding emergency services and surprise bills. The rule provides that once a dispute is submitted for review by an IDRE, the parties must provide certain information specified by the statute. Within three days of receipt of a dispute, the IDRE shall screen the application for conflicts of interest, review the application to determine if the dispute is eligible for the IDR process, and, if necessary, contact the parties for additional information needed to determine eligibility. Within three days of determining that the dispute is eligible, the IDRE sends notification of the assignment to the parties and asks for all information to be submitted within five business days. The IDRE may direct the parties to attempt a good faith negotiation for settlement and the IDRE must have the dispute reviewed by a neutral and impartial reviewer with knowledge of billing and usual, customary, and reasonable rates, in consultation with a licensed physician in active practice. The IDRE must make a determination within 30 days of receipt of the request for independent dispute resolution, choosing either the provider bill or the health plan payment.

The rule establishes requirements for record retention and compliance by IDREs and describes how payment for the independent dispute resolution process will work. The losing party pays the cost of the dispute resolution with an exception if payment would pose a hardship for an uninsured patient who brings a dispute and does not prevail.

4. Costs: Insurers and providers should incur minimal additional costs to comply with the requirements of the rule. This rule implements the IDR process required by Financial Services Law Article 6. The minimal costs for physicians may include costs to provide an assignment of benefits form with bills for out-of-network services, although some physicians may have similar processes already. If a physician or other provider submits a dispute for resolution, the person or persons who already handle billing for the physician or provider would most likely be able to submit the dispute. Other costs include the cost of the IDR process, which is paid by the losing party to the dispute as required by Financial Services Law Article 6. The Department will contract with IDREs and approve the fees the IDREs charge for the IDR process. The minimal costs for insurers may also include costs to provide insureds with notice about a surprise bill and information how to proceed. However, insurers currently provide an explanation of benefits to insureds and the requisite notice may be contained within the existing explanation of benefits or accompany it in order to mitigate costs.

The Department will incur costs to implement the independent dispute resolution process as the Department is responsible for overseeing the process and certifying the IDREs. However, these costs will be incurred due to the statute. Moreover, the costs to the Department should be minimal as the independent dispute resolution entities will be conducting the actual review of the disputes. There are no costs to any other state government agency or local government.

5. Local government mandates: The rule imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: This rule implements the IDR process by which a dispute for a bill for emergency services or a surprise bill may be resolved and identifies the information that must be submitted to the IDRE, as required pursuant to Financial Services Law Article 6. Health care plans, providers and patients will need to submit an application in order to pursue a dispute. This rule also requires an IDRE to retain case records in accordance with 11 NYCRR 243 for audit and examination for a period of six years from the date of the IDRE's determination. The IDRE must maintain on file each attestation required to be submitted under the rule for six years from the date of the determination. The rule further requires an IDRE to provide monthly reports to the Superintendent or any information as required or requested by the Superintendent within two business days or such other period as acceptable to the Superintendent. The IDRE must provide the Superintendent data, information and reports as the Superintendent determines necessary to evaluate the dispute resolution process.

7. Duplication: This rule will not duplicate any existing state rule.

8. Alternatives: This rule implements the IDR process for bills for emergency services and surprise bills. The Department met with stakeholders during the development of the rule. Alternatives were suggested during these meetings regarding the reviewer of the dispute. One suggested alternative was to have the dispute reviewed solely by a physician reviewer. Another suggested alternative was to have the dispute reviewed

solely by a non-physician reviewer. Financial Services Law Section 601 requires that IDREs use licensed physicians in active practice in the same or similar specialty as the physician providing the service that is the subject of the dispute. The Department decided that IDREs must use a non-physician reviewer to render a determination in consultation with a physician reviewer. The Department believes this approach is consistent with the law, will ensure fair decisions, and will help to minimize the costs of the review.

The Department also considered alternatives regarding the notice that the health plan must send to the insured and non-participating provider when a claim for a surprise bill is received. The Department originally considered requiring health plans to send a detailed notice upon receipt of a potential surprise bill to both the insured and the non-participating provider. Stakeholders indicated that without an assignment of benefits form, health plans would be unable to determine whether a claim could be for a surprise bill upon receipt and that it would be cumbersome to send the notice in response to all claims involving the services of non-participating providers. Therefore, the rule requires health plans to provide detailed notice to the insured and non-participating provider only when an assignment of benefits form is submitted with the claim or the health plan otherwise determines that the claim is for a surprise bill. When the health plan receives a claim that may be a surprise bill but is not submitted with an assignment of benefits form, the health plan must send an abbreviated notice to the insured directing the insured to contact the health plan or visit its website for information regarding surprise bills.

9. Federal standards: Public Health Service Act Section 2719A (42 U.S.C. § 300gg-19a) requires health care plans to cover emergency services. Federal regulations implementing this law (45 CFR § 147.138(b)) require health care plans and insurers to reimburse out-of-network providers of emergency services the greatest amount of the following three amounts: (1) the amount negotiated with in-network providers for the emergency service, excluding any in-network copayment or coinsurance; (2) the amount for the emergency service calculated using the same method the plan generally uses to determine payments for out-of-network services, excluding any in-network copayment or coinsurance; or (3) the amount that would be paid under Medicare (Part A or B of Title XVIII of the Social Security Act) for the emergency service, excluding any in-network copayment or coinsurance. Health care plans must reimburse out-of-network providers of emergency services at least the amount described in the federal rule but may pay the out-of-network provider additional amounts. The IDR process established under this rule will allow health care plans and providers to dispute amounts above the federal requirement.

10. Compliance schedule: The rule will take effect immediately upon its adoption and will affect health care services provided on and after March 31, 2014.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule affects all health maintenance organizations ("HMOs") and insurers authorized to do business in New York State that use the independent dispute resolution ("IDR") process set forth in the regulation to resolve disputes for bills for emergency services and surprise bills. Based upon information that those HMOs and insurers have provided in their annual statements filed with the Department of Financial Services, they are not "small businesses" as defined in State Administrative Procedures Act Section 102(8) because they are not independently owned and operated and do not employ 100 or fewer employees. This rule does not apply to, and therefore does not affect local governments.

Small businesses that may be impacted by this rule include physicians and certain other health care providers that participate in the IDR process. However, the Department has established no reporting requirements with respect to these small businesses. Furthermore, the Department does not maintain records of the number of physicians and health care providers licensed in this state. Notwithstanding, the rule is likely to have a favorable economic impact on small businesses that opt to utilize the IDR process to resolve disputes with insurers, rather than retain attorneys to resolve those disputes on their behalf in court.

2. Compliance requirements: This regulation will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The regulation only implements the IDR process for bills for emergency services and surprise bills as required pursuant to Financial Services Law Article 6.

3. Professional services: This regulation does not require any small business affected by this rule to use any professional services to comply with this regulation. Local governments are not affected by the rule, and thus will have no need for such services.

4. Compliance costs: This rule will have no impact on compliance costs for local governments, and may only have a minimal impact on compliance costs for small businesses. Those costs may include costs to provide an assignment of benefits form with bills for out-of-network services although some physicians may have similar processes already. Other costs include the cost of the IDR, which is paid by the losing party to the dispute.

However, the rule only establishes standards for an IDR process that is prescribed by statute. Furthermore, any costs to small businesses to participate in the IDR process should be much less than costs to litigate a bill dispute in court.

5. Economic and technological feasibility: Small businesses and local governments should not incur any economic or technological impact as a result of the regulation.

6. Minimizing adverse impact: This rule should have no adverse impact on small businesses or local governments because it only establishes standards for an IDR process prescribed by statute, and participation in the IDR process is voluntary. The rule may have a positive economic impact on providers who obtain favorable determinations with respect to disputes with insurers regarding reimbursement for emergency services and surprise bills.

7. Small business and local government participation: Interested parties, including small businesses, were afforded the opportunity to comment on this regulation, and the Department held numerous meetings with stakeholders to discuss the regulation.

#### **Rural Area Flexibility Analysis**

The Department of Financial Services (the "Department") finds that this rule does not impose any additional burden on persons located in rural areas and that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in rural and non-rural areas of New York State. Rule Area Participation: Interested parties, including those located in rural areas, were given an opportunity to comment on the drafting of this rule and the Department held several meetings with HMOs, insurers, physicians, other providers and consumer groups.

#### **Job Impact Statement**

The Department of Financial Services finds that this rule should have no substantial adverse impact on job or employment opportunities in New York. The rule implements Article 6 of the Financial Services Law, which establishes an independent dispute resolution ("IDR") process by which health maintenance organizations, insurers, physicians, and in certain cases, patients and other health care providers may submit a dispute involving bills for emergency services and surprise bills for IDR. Article 6 also mandates the Superintendent to select and certify an independent dispute resolution entity ("IDRE") to oversee the IDR process. Serving as an IDRE, as well as participating in the IDR process, are voluntary.

On the other hand, Article 6 requires the IDRE to utilize licensed physicians for the IDR process, which should promote job and employment opportunities in the State.

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## New York State Gaming Commission

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### NOTICE OF ADOPTION

#### **To Limit the Use of the Corticosteroid Methylprednisolone Acetate (e.g., Depo-Medrol) in Thoroughbred Racing**

**I.D. No.** SGC-49-13-00019-A

**Filing No.** 1048

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of section 4043.2(k) to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

**Subject:** To limit the use of the corticosteroid methylprednisolone acetate (e.g., Depo-Medrol) in thoroughbred racing.

**Purpose:** To enhance the integrity and safety of thoroughbred horse racing.

**Text or summary was published in** the December 4, 2013 issue of the Register, I.D. No. SGC-49-13-00019-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, PO Box 7500, Schenectady, NY 12305-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

#### **Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The Commission received public comments, including as part of the record of its duly noticed legislative rulemaking public hearing held on January 21, 2014. Representatives of the Racing Medication and Testing Consortium ("RMTC") distinguished its recommended threshold and withdrawal guideline for intra-articular ("IA") administration of methylprednisolone acetate (e.g., Depo-Medrol), for which research was based on treating only a limited (one or two) number of joints with just one (e.g., a specific dose calculated by a horse's weight) clinically accepted veterinary practice. RMTC indicated, including in its written materials for the public hearing, that this IA corticosteroid could not be used intramuscularly without greatly extending its withdrawal time, that its clearance time more than doubled when the research IA dose was increased from 100 to 200 mg, and a large number of threshold violations occurred during the first year the proposed threshold had been adopted in one state. RMTC further indicated that while the proposed threshold for this drug was derived for a pre-conceived minimum withdrawal period (seven days) to provide a sufficient period of time for a thoroughbred horse to be re-evaluated after joint treatment before racing, a test result in excess of this threshold does not establish an administration of the drug within such time period. Rather, a test result not in excess of the proposed threshold for this drug is consistent with the drug having not been administered to the horse by means of a joint injection within seven days of the horse's race. The Commission also received written comments submitted by The Jockey Club in support of the adoption of the national thresholds and withdrawal guidelines. The Jockey Club further suggested that the Commission do away with restricted time periods.

This amendment is designed only to provide a restriction on the use of methylprednisolone that performs the essential function of providing a simple instruction for trainers to follow for when to stop the administration of this drug before a horse's next race. The Commission's restrictions ensure that a trainer who complies will not incur a threshold violation with the drug.

A further assessment of the public comments is provided in the following official Fact Finding in regard to this legislative rulemaking proposal that the Commission, based on decades of institutional knowledge and close supervision of thoroughbred horse racing in New York, the veterinary expertise of Equine Medical Director Scott Palmer, D.V.M., and consultation with internationally-renowned equine pharmacologist, toxicologist, and equine practices scientific consultant, George A. Maylin, D.V.M., M.S., Ph.D, made on November 24, 2014.

The Commission made the following rulemaking fact finding with regard to this rulemaking:

Agency Finding # 9: The threshold for methylprednisolone requires, in order for the use restriction for such drug to provide the assurance that is described in Agency Finding # 1 [made in regard to the adoption of the rulemaking identified as SGC-49-13-00020-P, RP] that the administration of any methylprednisolone acetate (e.g., Depo Medrol) causes the horse to be ineligible to race until the horse tests below the threshold and is released to race by the stewards. A clinical dose of this drug may result in a positive test for more than 50 days after some joint injections, yet a small clinical dose in a different joint may result in a concentration in the horse's plasma below the threshold value within seven days. As a result, a single restricted time period may be unreasonable for this drug. The Commission also lacks sufficient scientific data to formulate a reasonably precise restricted time period that can protect regulated parties in all circumstances, as further described in Agency Findings # 4 and # 5 [made in regard to the adoption of the rulemaking identified as SGC-49-13-00020-RP]. There are too many unknown variables to adopt a specific time period for this drug. Rather than prohibit the use of any formulation of this drug, which might be the best therapeutic option in some circumstances, a use restriction that the horse must test negative and be released to race by the stewards will limit the use of this drug to such circumstances and provide the Commission and regulated parties with a use restriction that is reasonable to apply.

### NOTICE OF ADOPTION

#### **Per Se Thoroughbred Regulatory Thresholds for Equine Drugs**

**I.D. No.** SGC-49-13-00020-A

**Filing No.** 1049

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Renumbering of section 4043.3 to section 4043.13; and addition of new section 4043.3 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

**Subject:** Per Se thoroughbred regulatory thresholds for equine drugs.

**Purpose:** To enhance the integrity and safety of thoroughbred horse racing by adopting Per Se thresholds for 24 common medications.

**Text or summary was published in** the December 4, 2013 issue of the Register, I.D. No. SGC-49-13-00020-P.

**Final rule as compared with last published rule:** No changes.

**Revised rule making(s) were previously published in the State Register on** September 17, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, PO Box 7500, Schenectady, NY 12305-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

#### Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The Commission received public comments, including as part of the record of its duly noticed legislative rulemaking public hearing held on January 21, 2014, in support of the proposed thresholds for thoroughbred racing. Representatives of the Racing Medication and Testing Consortium ("RMTC") distinguished its three recommended thresholds and withdrawal guidelines for intra-articular ("IA") corticosteroids, for which research was based on treating only a limited (one or two) number of joints with just one (e.g., a specific dose calculated by a horse's weight) clinically accepted veterinary practice. RMTC indicated, including in its written materials for the public hearing, that these three IA corticosteroids could not be used intramuscularly without greatly extending their withdrawal times; that the clearance time of one (Depo-Medrol), for example, more than doubled when the research IA dose was increased from 100 to 200 mg; and that the thresholds for these three corticosteroids were derived for a pre-conceived minimum withdrawal period to provide a sufficient period of time for a horse to be re-evaluated after joint treatment before racing a thoroughbred racehorse. Systemic use of these IA corticosteroids was discouraged because it greatly increases withdrawal periods. RMTC also commented that the other thresholds excepting firocoxib are consistent with affecting race performance by being pharmacologically active or, for the drug clenbuterol, by the persistence of abnormal muscle mass created by long-term abuse of the drug. The Commission also received written comments submitted by The Jockey Club in support of the adoption of the national thresholds and withdrawal guidelines.

The Commission proposed a revised rulemaking solely to eliminate a separate provision, unrelated to the foregoing comments, of a zero threshold for all other drugs that could affect race performance. That provision was removed from this legislative rulemaking proposal after it was abandoned nationally. The Commission then received additional written public comments. The New York Racing Association, Inc. ("NYRA") supported the Commission's revised proposal. The American Graded Stakes Committee supported the adoption of uniform medication rules without amendments. The Jockey Club supported the adoption of the national thresholds and recommended that the Commission move away from restricted time periods.

The Commission proposed per se threshold rules for these 24 drugs to complement the Commission's restricted time period rules, which perform the essential function of providing a simple instruction for trainers to follow for when to stop the administration of various drugs before a horse's next race. The per se threshold rules are intended to ensure that drugs will not be used in a manner that could endanger a horse and jockeys or manipulate the outcome of pari-mutuel horse races. The rules will simplify the administrative adjudication of equine rule violations by making it an automatic rule violation to exceed threshold. The adoption of the thresholds nationally will also make it easier for trainers to race in New York and elsewhere. Although trainers who participate in other states are explicitly not assured that using the 24 drugs at recommended withdrawal times will prevent the occurrence of a positive post-race test, trainers may rely on the Commission's restricted time periods, when following accepted veterinary practices (e.g., clinical doses), to ensure their compliance with these thresholds in all states.

A further assessment of the public comments is provided in the following official Fact Findings in regard to this legislative rulemaking proposal that the Commission, based on decades of institutional knowledge and close supervision of thoroughbred horse racing in New York, the veterinary expertise of Equine Medical Director Scott Palmer, D.V.M., and consultation with internationally-renowned equine pharmacologist, toxicologist, and equine practices scientific consultant, George A. Maylin, D.V.M., M.S., Ph.D., made on November 24, 2014.

The Commission made the following rulemaking fact findings with regard to this rulemaking:

#### Agency Finding # 1:

A horse will not incur a positive laboratory finding in excess of the following thresholds, following an administration of the drug in which the drug regimen is consistent with accepted veterinary practice, e.g., the administration of a clinical dose, provided that the drug is not administered within the Commission's restricted time periods (including as adopted today [at the Commission's meeting on November 24, 2014]):

1. Acepromazine [96 hours]: 10 ng/ml HEPS in urine
2. Butorphanol [96 hours]: 300 ng/ml of total butorphanol in urine or 2 ng/ml of free butorphanol in plasma
3. Clenbuterol [14 days]: 140 pg/ml in urine or any clenbuterol in plasma
4. Dantrolene [72 hours]: 100 pg/ml of 5-hydroxydantrolene in plasma
5. Detomidine [96 hours]: 1 ng/ml of any metabolite of detomidine in urine or any detomidine in plasma
6. Dexamethasone [5 days]: 5 pg/ml in plasma
7. Diclofenac [48 hours]: 5 ng/ml in plasma
8. DMSO [48 hours]: 10 mcg/ml in plasma
9. Firocoxib [14 days]: 20 ng/ml in plasma
10. Flunixin [48 hours]: 20 ng/ml in plasma
11. Furosemide [4-4.5 hours]: 100 ng/ml in plasma and a specific gravity of urine less than 1.010
12. Glycopyrrolate [96 hours]: 3 pg/ml in plasma
13. Ketoprofen [48 hours]: 10 ng/ml in plasma
14. Lidocaine [96 hours]: 20 pg/ml of total 3-hydroxylidocaine in plasma
15. Mepivacaine [96 hours]: 10 ng/ml of total hydroxymepivacaine in urine or any hydroxymepivacaine in plasma
16. Methocarbamol [72 hours]: 1 ng/ml in plasma
17. Omeprazole [24 hours]: 1 ng/ml of omeprazole sulfide in urine
18. Phenylbutazone [48 hours]: 2 mcg/ml in plasma; Procaine penicillin: 25 ng/ml of procaine in plasma
19. Prednisolone [5 days]: 1 ng/ml in plasma
20. Procaine penicillin [7 days]: 25 ng/ml of procaine in plasma
21. Xylazine [96 hours]: 10 pg/ml of total xylazine and its metabolites in plasma.

#### Agency Finding # 2:

If there is a positive laboratory finding in excess of a foregoing threshold, then the administration of such drug had the potential to affect the race performance of such horse.

#### Agency Finding # 3:

If there is a positive laboratory finding in excess of a foregoing threshold, assuming an administration of the drug in which the drug regimen is consistent with accepted veterinary practice, then a violation of the Commission's restricted time period for such drug occurred.

#### Agency Finding # 4:

It is difficult to enforce a restricted time period applicable to corticosteroid joint injections due to various factors, e.g., (1) multiple joints are often treated; (2) certain joints are interconnected; (3) various size doses are consistent with accepted veterinary practice; (4) other substances may be included with a corticosteroid in a joint injection. It is important to regulate corticosteroid joint injections because of the impact such treatments may have on race performance and the health and safety of race horses and human participants, e.g., the jockeys. The following regulatory thresholds create a threshold value for corticosteroids that are permitted only for joint injections, with which a responsible person can reasonably be expected to comply. The Commission's restricted time period of seven days before a horse's next race, because of the various factors that could affect the concentration of the target analyte as found by a laboratory, however, has not been shown to provide the same assurance that is described in Agency Finding # 1. The Commission can reasonably enforce the following thresholds, provided that leniency is exercised in regard to a regulated party when the Commission finds that a preponderance of the evidence establishes that the administration did not occur within the restricted time period (such leniency may range from issuing a warning letter to mitigation of the penalty that is imposed):

22. Betamethasone: 10 pg/ml in plasma
23. Triamcinolone acetate: 100 pg/ml in plasma

#### Agency Finding # 5:

Methylprednisolone is a corticosteroid that the Commission finds requires more strict regulation because of various factors, e.g., (1) the drug can be particularly harmful to the long term health of treated joints and tissues, (2) the drug has the potential to affect race performance for an unusually long period of time, (3) the drug can be detected in laboratory tests for an unusually long period of time, particularly if some of the drug is injected outside of the joint capsule. The most reasonable use restriction to provide the same assurance that is described in Agency Finding # 1 is to make every horse treated with this drug ineligible to race until the horse

tests below the threshold and is released to race by the stewards. The threshold itself is reasonable, however, because it is difficult to enforce a restricted time period applicable to corticosteroid joint injections due to various factors (see Agency Finding # 4) and because this threshold is consistent with effectively proscribing the administration of even a small clinical dose in a single joint within seven days before a horse's next race. A seven day waiting period before a Thoroughbred horse's next race is important to ensure that the horse is treated sufficiently before its next race to permit the attending veterinarian to re-evaluate the condition of the horse after treating the horse with such corticosteroid joint injection.

24. Methylprednisolone: 100 pg/ml in plasma

Agency Finding # 6:

The thresholds for betamethasone and triamcinolone acetonide require that such drugs be administered only as a joint injection because if betamethasone or any formulation of triamcinolone were administered outside of the joint capsule then such drug could be detected in race day samples at a concentration in excess of the threshold for a much longer period of time than the applicable (seven day) restricted time period. With this requirement in place, the restricted time periods for these two corticosteroids provide a reasonable assurance that a person who complies with them will not incur a threshold violation, as further described in Agency Finding # 4.

#### NOTICE OF ADOPTION

##### Restricted Time Period for Systemic Administrations of Corticosteroids to Thoroughbred Horses

**I.D. No.** SGC-49-13-00021-A

**Filing No.** 1052

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 4043.2(i) of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

**Subject:** Restricted time period for systemic administrations of corticosteroids to thoroughbred horses.

**Purpose:** To enhance the integrity and safety of thoroughbred horse racing.

**Text or summary was published in** the December 4, 2013 issue of the Register, I.D. No. SGC-49-13-00021-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, PO Box 7500, Schenectady, NY 12305-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

**Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

##### Assessment of Public Comment

The Commission received public comments that are included in the record of its duly noticed legislative rulemaking public hearing held on January 21, 2014. The executive director of the Racing Medication and Testing Consortium ("RMTC") testified that the corticosteroids dexamethasone and prednisolone can be effectively regulated with thresholds to prevent the drugs from being pharmacologically active on race day, but other corticosteroids may persist for much longer when administered systemically. In its written materials for the public hearing, RMTC expressed concern that smaller doses of these drugs might be appropriate therapy within a day or two of racing. The Jockey Club submitted several letters following the public comment period in support of the nationally proposed thresholds and withdrawal times, and suggesting that the Commission do away with restricted time periods.

This amendment is designed only to restrict which corticosteroids may be used systemically until five days before racing, rather than at least seven days before racing as provided by the Commission's "catch-all" rule, not to change the restricted time period for such treatments. The Commission amended its restricted time periods for systemic (non-joint) administrations of corticosteroids from 48 hours to five days before a horse's next race on December 26, 2013, as recommended by the New York Task Force on Racehorse Health and Safety. This amendment was identified as necessary for the health and safety of the equine and human athletes and to provide clear guidance as to when administration should be discontinued for testing purposes.

A further assessment of the public comments is provided in the following official Fact Finding in regard to this legislative rulemaking proposal that the Commission, based on decades of institutional knowledge and close supervision of thoroughbred horse racing in New York, the veterinary expertise of Equine Medical Director Scott Palmer, D.V.M., and consultation with internationally-renowned equine pharmacologist, toxicologist, and equine practices scientific consultant, George A. Maylin, D.V.M., M.S., Ph.D, made on November 24, 2014.

Agency Finding # 7: The following corticosteroids are sufficient to provide good veterinary care to a Thoroughbred race horse close to race day, when a veterinarian has determined there is a therapeutic value in treating the horse with a systemic administration of such a corticosteroid, and the pharmacology of such drugs has been sufficiently studied to permit the Commission to assess and control their use by means of laboratory tests. These are the only two corticosteroids for which such findings currently can be made and that are the subject of a national movement toward more uniformity. The Commission finds that it is reasonable to limit the corticosteroids that may be used within seven days before a horse's next race to the systemic use of these corticosteroids:

1. Dexamethasone
2. Prednisolone.

#### NOTICE OF ADOPTION

##### Restricted Time Period After IV Administrations of Flunixin to Thoroughbred Horses

**I.D. No.** SGC-49-13-00022-A

**Filing No.** 1053

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 4043.2(d) and (e) of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

**Subject:** Restricted time period after IV administrations of flunixin to thoroughbred horses.

**Purpose:** To enhance the integrity and safety of thoroughbred horse racing.

**Text or summary was published in** the December 4, 2013 issue of the Register, I.D. No. SGC-49-13-00022-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, PO Box 7500, Schenectady, NY 12305-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

**Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

##### Assessment of Public Comment

The Commission received public comments that are included in the record of its duly noticed legislative rulemaking public hearing held on January 21, 2014, in support of coordinating its restricted time period for thoroughbred race horses with the Commission's separately proposed laboratory threshold for flunixin. The executive director of the Racing Medication and Testing Consortium ("RMTC") testified that RMTC decided further research was necessary on the subject of its 24-hour withdrawal guideline, and counseled it was "very important" to administer a specific dose based on the horse's weight in order to avoid a threshold violation. RMTC was further concerned about flunixin's very short half-life, meaning that a horse testing just below the flunixin threshold in post-race samples will have a relatively high concentration of this drug at the time of the horse's pre-race examination earlier in the day, causing a greater risk that the examining veterinarian might not detect lameness that should prevent a horse from being allowed to race, in comparison to a common alternative nonsteroidal anti-inflammatory drug ("NSAID"), phenylbutazone.

The Commission received several written comments following the public hearing and the public comment period. The Jockey Club ("TJC") submitted two letters encouraging the Commission to maintain the proposed national thresholds and withdrawal times. After another organization, the New York Thoroughbred Horsemen's Association ("NYTHA"), issued a press release urging horsepersons not to administer the specified dose any closer than 32 hours before a horse's next race and af-

ter RMTC revised its recommended withdrawal guideline to 32 hours, TJC further commented that the Commission should move away from having restricted time periods.

The Commission's restricted time periods complement its proposed per se thresholds and perform the essential function of providing a simple instruction for trainers to follow for when to stop the administration of various drugs before a horse's next race. Although trainers who participate in other states are explicitly not assured that the recommended withdrawal time of RMTC for flunixin will prevent the occurrence of a positive post-race test, trainers may rely on the Commission's restricted time period, when following accepted veterinary practices (e.g., clinical doses), to ensure their compliance with the national flunixin threshold in all states.

A further assessment of the public comments is provided in the following official Fact Finding in regard to this legislative rulemaking proposal that the Commission, based on decades of institutional knowledge and close supervision of thoroughbred horse racing in New York, the veterinary expertise of Equine Medical Director Scott Palmer, D.V.M., and consultation with internationally-renowned equine pharmacologist, toxicologist, and equine practices scientific consultant, George A. Maylin, D.V.M., M.S., Ph.D, made on November 24, 2014.

The Commission made the following rulemaking fact finding with regard to this rulemaking:

Agency Finding # 8: The Commission finds that it is necessary and proper to repeal the previous permission to inject a Thoroughbred horse with flunixin until 24 hours before its next race and to restore our historic restricted time period of administration by any means until 48 hours before a horse's next race. For 34 years, from 1971 to 2005, the latter was the restricted time period in New York and there were no complaints and few positives. The shorter restricted time period has resulted in a large number of rule violations and is inappropriate because of a number of factors, e.g., (1) flunixin is often obtained from a compounding pharmacy which cannot provide an accurate and reliable concentration of the drug as well as a pharmaceutical company and the Commission does not want regulated parties who comply with its restricted time periods to incur a threshold violation; (2) many regulated persons (e.g., trainers) have incurred a drug positive after having confused the limited route of administration (IV only) permitted since 2005 and given flunixin as an oral paste that has a longer clearance and detection time of the drug; (3) a 48-hour restricted time period for all permitted nonsteroidal anti-inflammatory drugs ("NSAID") eliminates the artificial incentive for a regulated party to choose flunixin for treating a horse close to its next race when there are other permitted NSAIDs that are more efficient and predictable (a longer half-life); (4) a 48-hour restricted time period for all NSAIDs prevents administrations of multiple NSAIDs ("stacking") for a period of 48 hours before a horse's next race; (5) a restricted time period of 48 hours does not permit any NSAID administrations the day before a horse races and this enhances the ability of the Commission to regulate drug use in the stables; (6) the Commission expects, based on the available research data, that regulated parties would have inadvertent positives were the Commission to adopt a restricted time period for flunixin of 32 hours; (7) the Commission would introduce complexity and confusion with a 32-hour restricted time period rather than our standard multiples of 24 hours (e.g., 24, 48, 72, 96 hours) before race day; (8) a 48-hour restricted time period ensures that a person who complies with the restricted time period will not incur a drug positive with a clinical dose, the assurance described in Agency Finding # 1 [made in regard to the adoption of the rulemaking identified as SGC-49-13-00020-P, RP]; (9) a restricted time period of 48 hours minimizes how much a pre-race flunixin administration can interfere with an examining veterinarian's detection of lameness in the hours immediately preceding a race.

## NOTICE OF ADOPTION

### Limits Betamethasone, Methylprednisolone and Triamcinolone to Only Joint Injections in Thoroughbred Horses

**I.D. No.** SGC-37-14-00006-A

**Filing No.** 1051

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 4043.2(i)(2) of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutual Wagering and Breeding Law, sections 103(2), 104(1), (19) and 122

**Subject:** Limits betamethasone, methylprednisolone and triamcinolone to only joint injections in thoroughbred horses.

**Purpose:** To enhance the integrity and safety of thoroughbred horse racing. **Text or summary was published in** the September 17, 2014 issue of the Register, I.D. No. SGC-37-14-00006-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, Acting Secretary, New York State Gaming Commission, One Broadway Center, PO Box 7500, Schenectady, NY 12305-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

### Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

### Assessment of Public Comment

The Commission received three public comments. The New York Racing Association, Inc. ("NYRA") supported the Commission's proposal. The American Graded Stakes Committee supported the adoption of uniform medication rules without amendments. The Jockey Club supported the adoption of the national thresholds and recommended that the Commission move away from restricted time periods. This amendment is designed only to restrict the use of three particular corticosteroids to joint injections, which is recommended nationally. The purpose of the restriction is to prevent inadvertent violations of the proposed thresholds, which could occur because administrations of these drugs outside of the joint capsule will result in a much slower clearance of the drugs and their metabolites from the bodily system of a horse. The Commission chose not to move away from restricted time periods for these three drugs because restricted time periods perform the essential function of providing a simple instruction for trainers to follow for when to stop the administration of various drugs before a horse's next race.

## Department of Health

### EMERGENCY RULE MAKING

#### Children's Camps

**I.D. No.** HLT-52-14-00008-E

**Filing No.** 1045

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Subpart 7-2 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 225

**Finding of necessity for emergency rule:** Preservation of public safety.

**Specific reasons underlying the finding of necessity:** Chapter 501 of the Laws of 2012 established the Justice Center for the Protection of People with Special Needs ("Justice Center"), in order to coordinate and improve the State's ability to protect those persons having various physical, developmental, or mental disabilities and who are receiving services from various facilities or provider agencies. The Department must promulgate regulations as a "state oversight agency." These regulations will assure proper coordination with the efforts of the Justice Center.

Among the facilities covered by Chapter 501 are children's camps having enrollments with 20 percent or more developmentally disabled campers. These camps are regulated by the Department and, in some cases, by local health departments, pursuant to Article 13-B of the Public Health Law and 10 NYCRR Subpart 7-2. Given the effective date of Chapter 501 and its relation to the start of the camp season, these implementing regulations must be promulgated on an emergency basis in order to assure the necessary protections for vulnerable persons at such camps. Absent emergency promulgation, such persons would be denied initial coordinated protections until the 2015 camp season. Promulgating these regulations on an emergency basis will provide such protection, while still providing a full opportunity for comment and input as part of a formal rulemaking process which will also occur pursuant to the State Administrative Procedures Act. The Department is authorized to promulgate these rules pursuant to sections 201 and 225 of the Public Health Law.

Promulgating the regulations on an emergency basis will ensure that

campers with special needs promptly receive the coordinated protections to be provided to similar individuals cared for in other settings. Such protections include reduced risk of being cared for by staff with a history of inappropriate actions such as physical, psychological or sexual abuse towards persons with special needs. Perpetrators of such abuse often seek legitimate access to children so it is critical to camper safety that individuals who that have committed such acts are kept out of camps. The regulation provides an additional mechanism for camp operators to do so. The regulations also reduce the risk of incidents involving physical, psychological or sexual abuse towards persons with special needs by ensuring that such occurrences are fully and completely investigated, by ensuring that camp staff are more fully trained and aware of abuse and reporting obligations, allowing staff and volunteers to better identify inappropriate staff behavior and provide a mechanism for reporting injustice to this vulnerable population. Early detection and response are critical components for mitigating injury to an individual and will prevent a perpetrator from hurting additional children. Finally, prompt enactment of the proposed regulations will ensure that occurrences are fully investigated and evaluated by the camp, and that measures are taken to reduce the risk of re-occurrence in the future. Absent emergency adoption, these benefits and protections will not be available to campers with special needs until the formal rulemaking process is complete, with the attendant loss of additional protections against abuse and neglect, including physical, psychological, and sexual abuse.

**Subject:** Children's Camps.

**Purpose:** To include camps for children with developmental disabilities as a type of facility within the oversight of the Justice Center.

**Substance of emergency rule:** The Department is amending 10 NYCRR Subpart 7-2 Children's Camps as an emergency rulemaking to conform the Department's regulations to requirements added or modified as a result of Chapter 501 of the Laws of 2012 which created the Justice Center for the Protection of Persons with Special Needs (Justice Center). Specifically, the revisions:

- amend section 7-2.5(o) to modify the definition of "adequate supervision," to incorporate the additional requirements being imposed on camps otherwise subject to the requirements of section 7-2.25
- amend section 7-2.24 to address the provision of variances and waivers as they apply to the requirements set forth in section 7-2.25
- amend section 7-2.25 to add definitions for "camp staff," "Department," "Justice Center," and "Reportable Incident"

With regard to camps with 20 percent or more developmentally disabled children, which are subject to the provisions of 10 NYCRR section 7-2.25, add requirements as follows:

- amend section 7-2.25 to add new requirements addressing the reporting of reportable incidents to the Justice Center, to require screening of camp staff, camp staff training regarding reporting, and provision of a code of conduct to camp staff
- amend section 7-2.25 to add new requirements providing for the disclosure of information to the Justice Center and/or the Department and, under certain circumstances, to make certain records available for public inspection and copying
- amend section 7-2.25 to add new requirements related to the investigation of reportable incidents involving campers with developmental disabilities
- amend section 7-2.25 to add new requirements regarding the establishment and operation of an incident review committee, and to allow an exemption from that requirement under appropriate circumstances
- amend section 7-2.25 to provide that a permit may be denied, revoked, or suspended if the camp fails to comply with the regulations, policies or other requirements of the Justice Center

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

#### Regulatory Impact Statement

Statutory Authority:

The Public Health and Health Planning Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. Article 13-B of the PHL sets forth sanitary and safety requirements for children's camps. PHL Sections 225 and 201(1)(m) authorize SSC regulation of the sanitary aspects of businesses and activities affecting public health including children's camps.

Legislative Objectives:

In enacting to Chapter 501 of the Laws of 2012, the legislature established the New York State Justice Center for the Protection of People with Special Needs (Justice Center) to strengthen and standardize the safety net for vulnerable people that receive care from New York's Human Services Agencies and Programs. The legislation includes children's camps for children with developmental disabilities within its scope and requires the Department of Health to promulgate regulations approved by the Justice Center pertaining to incident management. The proposed amendments further the legislative objective of protecting the health and safety of vulnerable children attending camps in New York State (NYS).

Needs and Benefits:

The legislation amended Article 11 of Social Services law as it pertains to children's camps as follows. It:

- included overnight, summer day and traveling summer day camps for children with developmental disabilities as facilities required to comply with the Justice Center requirements.
- defined the types of incident required to be reported by children's camps for children with developmental disabilities to the Justice Center Vulnerable Persons' Central Registry.
- mandated that the regulations pertaining to children's camps for children with developmental disabilities are amended to include incident management procedures and requirements consistent with Justice Center guidelines and standards.
- required that children's camps for children with developmental disabilities establish an incident review committee, recognizing that the Department could provide for a waiver of that requirement under certain circumstances.
- required that children's camps for children with developmental disabilities consult the Justice Center's staff exclusion list (SEL) to ensure that prospective employees are not on that list and to, where the prospective employee is not on that list, to also consult the Office of Children and Family Services State Central Registry of Child Abuse and Maltreatment (SCR) to determine whether prospective employees are on that list.
- required that children's camps for children with developmental disabilities publicly disclose certain information regarding incidents of abuse and neglect if required by the Justice Center to do so.

The children's camp regulations, Subpart 7-2 of the SSC are being amended in accordance with the aforementioned legislation.

Compliance Costs:

Cost to Regulated Parties:

The amendments impose additional requirements on children's camp operators for reporting and cooperating with Department of Health investigations at children's camps for children with developmental disabilities (hereafter "camps"). The cost to affected parties is difficult to estimate due to variation in salaries for camp staff and the amount of time needed to investigate each reported incident. Reporting an incident is expected to take less than half an hour; assisting with the investigation will range from several hours to two staff days. Using a high estimate of staff salary of \$30.00 an hour, total staff cost would range from \$120 to \$1600 for each investigation. Expenses are nonetheless expected to be minimal statewide as between 40 and 50 children's camps for children with developmental disabilities operate each year, with combined reports of zero to two incidents a year statewide. Accordingly, any individual camp will be very unlikely to experience costs related to reporting or investigation.

Each camp will incur expenses for contacting the Justice Center to verify that potential employees, volunteers or others falling within the definition of "custodian" under section 488 of the Social Services Law (collectively "employees") are not on the Staff Exclusion List (SEL). The effect of adding this consultation should be minimal. An entry level staff person earning the minimum wage of \$7.25/hour should be able to compile the necessary information for 100 employees, and complete the consultation with the Justice Center, within a few hours.

Similarly, each camp will incur expenses for contacting the Office of Children and Family Services (OCFS) to determine whether potential employees are on the State Central Registry of Child Abuse and Maltreatment (SCR) when consultation with the Justice Center shows that the prospective employee is not on the SEL. The effect of adding this consultation should also be minimal, particularly since it will not always be necessary. An entry level staff person earning the minimum wage of \$7.25/hour should be able to compile the necessary information for 100 employees, and complete the consultation with the OCFS, within a few hours. Assuming that each employee is subject to both screens, aggregate staff time required should not be more than six to eight hours. Additionally, OCFS imposes a \$25.00 screening fee for new or prospective employees.

Camps will be required to disclose information pertaining to reportable incidents to the Justice Center and to the permit issuing official investigating the incident. Costs associated with this include staff time for locating information and expenses for copying materials. Using a high estimate of staff salary of \$30.00 an hour, and assuming that staff may take up to two hours to locate and copy the records, typical cost should be under \$100.

Camps must also assure that camp staff, and certain others, who fall within the definition of mandated reporters under section 488 of the Social Services Law receive training related to mandated reporting to the Justice Center, and the obligations of those staff who are required to report incidents to the Justice Center. The costs associated with such training should be minimal as it is expected that the training material will be provided to the camps and will take about one hour to review during routine staff training. Camps must also ensure that the telephone number for the Justice Center reporting hotline is conspicuously posted for campers and staff. Cost associated with such posting is limited, related to making and posting a copy of such notice in appropriate locations.

The camp operator must also provide each camp staff member, and others who may have contact with campers, with a copy of a code of conduct established by the Justice Center pursuant to Section 554 of the Executive Law. The code must be provided at the time of initial employment, and at least annually thereafter during the term of employment. Receipt of the code of conduct must be acknowledged, and the recipient must further acknowledge that he or she has read and understands it. The cost of providing the code, and obtaining and filing the required employee acknowledgment, should be minimal, as it would be limited to copying and distributing the code, and to obtaining and filing the acknowledgments. Staff should need less than 30 minutes to review the code.

Camps will also be required to establish and maintain a facility incident review committee to review and guide the camp's responses to reportable incidents. The cost to maintain a facility incident review committee is difficult to estimate due to the variations in salaries for camp staff and the amount of time needed for the committee to do its business. A facility incident review committee must meet at least annually, and also within two weeks after a reportable incident occurs. Assuming the camp will have several staff members participate on the committee, an average salary of \$50.00 an hour and a three hour meeting, the cost is estimated to be \$450.00 dollars per meeting. However, the regulations also provide the opportunity for a camp to seek an exemption, which may be granted subject to Department approval based on the duration of the camp season and other factors. Accordingly, not all camps can be expected to bear this obligation and its associated costs.

Camps are now explicitly required to obtain an appropriate medical examination of a camper physically injured from a reportable incident. A medical examination has always been expected for such injuries.

Finally, the regulations add noncompliance with Justice Center-related requirements as a ground for denying, revoking, or suspending a camp operator's permit.

#### Cost to State and Local Government:

State agencies and local governments that operate children's camps for children with developmental disabilities will have the same costs described in the section entitled "Cost to Regulated Parties." Currently, it is estimated that five summer day camps that meet the criteria are operated by municipalities. The regulation imposes additional requirements on local health departments for receiving incident reports and investigations of reportable incidents, and providing a copy of the resulting report to the Department and the Justice Center. The total cost for these services is difficult to estimate because of the variation in the number of incidents and amount of time to investigate an incident. However, assuming the typically used estimate of \$50 an hour for health department staff conducting these tasks, an investigation generally lasting between one and four staff days, and assuming an eight hour day, the cost to investigate an incident will range \$400.00 to \$1600. Zero to two reportable incidents occur statewide each year, so a local health department is unlikely to bear such an expense. The cost of submitting the report is minimal, limited to copying and mailing a copy to the Department and the Justice Center.

#### Cost to the Department of Health:

There will be routine costs associated with printing and distributing the amended Code. The estimated cost to print revised code books for each regulated children's camp in NYS is approximately \$1600. There will be additional cost for printing and distributing training materials. The expenses will be minimal as most information will be distributed electronically. Local health departments will likely include paper copies of training materials in routine correspondence to camps that is sent each year.

#### Local Government Mandates:

Children's camps for children with developmental disabilities operated by local governments must comply with the same requirements imposed on camps operated by other entities, as described in the "Cost to Regulated Parties" section of this Regulatory Impact Statement. Local governments serving as permit issuing officials will face minimal additional reporting and investigation requirements, as described in the "Cost to State and Local Government" section of this Regulatory Impact Statement. The proposed amendments do not otherwise impose a new program or responsibilities on local governments. City and county health departments continue to be responsible for enforcing the amended regulations as part of their existing program responsibilities.

#### Paperwork:

The paperwork associated with the amendment includes the completion and submission of an incident report form to the local health department and Justice Center. Camps for children with developmental disabilities will also be required to provide the records and information necessary for LHD investigation of reportable incidents, and to retain documentation of the results of their consultation with the Justice Center regarding whether any given prospective employee was found to be on the SEL or the SCR.

#### Duplication:

This regulation does not duplicate any existing federal, state, or local regulation. The regulation is consistent with regulations promulgated by the Justice Center.

#### Alternatives:

The amendments to the camp code are mandated by law. No alternatives were considered.

Consideration was given to including a cure period to afford camp operators an opportunity to correct violations associated with this rule; however, this option was rejected because it is believed that lessening the department's ability to enforce the regulations could place this already vulnerable population at greater risk to their health and safety.

#### Federal Standards:

Currently, no federal law governs the operation of children's camps.

#### Compliance Schedule:

The proposed amendments are to be effective upon filing with the Secretary of State.

#### Regulatory Flexibility Analysis

Types and Estimated Number of Small Businesses and Local Governments:

There are between 40 and 50 regulated children's camps for children with developmental disabilities (38% are expected to be overnight camps and 62% are expected to be summer day camps) operating in New York State, which will be affected by the proposed rule. About 30% of summer day camps are operated by municipalities (towns, villages, and cities). Typical regulated children's camps representing small business include those owned/operated by corporations, hotels, motels and bungalow colonies, non-profit organizations (Girl/Boy Scouts of America, Cooperative Extension, YMCA, etc.) and others. None of the proposed amendments will apply solely to camps operated by small businesses or local governments.

#### Compliance Requirements:

##### Reporting and Recordkeeping:

The obligations imposed on small business and local government as camp operators are no different from those imposed on camps generally, as described in "Cost to Regulated Parties," "Local Government Mandates," and "Paperwork" sections of the Regulatory Impact Statement. The obligations imposed on local government as the permit issuing official is described in "Cost to State and Local Government" and "Local Government Mandates" portions of the Regulatory Impact Statement.

##### Other Affirmative Acts:

The obligations imposed on small business and local government as camp operators are no different from those imposed on camps generally, as described in "Cost to Regulated Parties" "Local Government Mandates," and "Paperwork" sections of the Regulatory Impact Statement.

##### Professional Services:

Camps with 20 percent or more developmentally disabled children are now explicitly required to obtain an appropriate medical examination of a camper physically injured from a reportable incident. A medical examination has always been expected for such injuries.

##### Compliance Costs:

##### Cost to Regulated Parties:

The obligations imposed on small business and local government as camp operators are no different from those imposed on camps generally, as described in "Cost to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement.

##### Cost to State and Local Government:

The obligations imposed on small business and local government as camp operators are no different from those imposed on camps generally, as described in the "Cost to Regulated Parties" section of the Regulatory Impact Statement. The obligations imposed on local government as the permit issuing official is described in "Cost to State and Local Government" and "Local Government Mandates" portions of the Regulatory Impact Statement.

##### Economic and Technological Feasibility:

There are no changes requiring the use of technology.

The proposal is believed to be economically feasible for impacted parties. The amendments impose additional reporting and investigation requirements that will use existing staff that already have similar job responsibilities. There are no requirements that that involve capital improvements.

##### Minimizing Adverse Economic Impact:

The amendments to the camp code are mandated by law. No alternatives were considered. The economic impact is already minimized.

Consideration was given to including a cure period to afford camp operators an opportunity to correct violations associated with this rule; however, this option was rejected because it is believed that lessening the department's ability to enforce the regulations could place this already vulnerable population at greater risk to their health and safety.

#### Small Business Participation and Local Government Participation:

No small business or local government participation was used for this rule development. The amendments to the camp code are mandated by law. Ample opportunity for comment will be provided as part of the process of promulgating the regulations, and training will be provided to affected entities with regard to the new requirements.

#### Rural Area Flexibility Analysis

##### Types and Estimated Number of Rural Areas:

There are between 40 and 50 regulated children's camps for children with development disabilities (38% are expected to be overnight camps and 62% are expected to be summer day camps) operating in New York State, which will be affected by the proposed rule. Currently, there are seven day camps and ten overnight camps operating in the 44 counties that have population less than 200,000. There are an additional four day camps and three overnight camps in the nine counties identified to have townships with a population density of 150 persons or less per square mile.

##### Reporting and Recordkeeping and Other Compliance Requirements:

##### Reporting and Recordkeeping:

The obligations imposed on camps in rural areas are no different from those imposed on camps generally, as described in "Cost to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement.

##### Other Compliance Requirements:

The obligations imposed on camps in rural areas are no different from those imposed on camps generally, as described in "Cost to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement.

##### Professional Services:

Camps with 20 percent or more developmentally disabled children are now explicitly required to obtain an appropriate medical examination of a camper physically injured from a reportable incident. A medical examination has always been expected for such injuries.

##### Compliance Costs:

##### Cost to Regulated Parties:

The costs imposed on camps in rural areas are no different from those imposed on camps generally, as described in "Cost to Regulated Parties" and "Paperwork" sections of the Regulatory Impact Statement.

##### Economic and Technological Feasibility:

There are no changes requiring the use of technology.

The proposal is believed to be economically feasible for impacted parties. The amendments impose additional reporting and investigation requirements that will use existing staff that already have similar job responsibilities. There are no requirements that that involve capital improvements.

##### Minimizing Adverse Economic Impact on Rural Area:

The amendments to the camp code are mandated by law. No alternatives were considered. The economic impact is already minimized, and no impacts are expected to be unique to rural areas.

Consideration was given to including a cure period to afford camp operators an opportunity to correct violations associated with this rule; however, this option was rejected because it is believed that lessening the department's ability to enforce the regulations could place this already vulnerable population at greater risk to their health and safety.

##### Rural Area Participation:

No rural area participation was used for this rule development. The amendments to the camp code are mandated by law. Ample opportunity for comment will be provided as part of the process of promulgating the routine regulations, and training will be provided to affected entities with regard to the new requirements.

#### Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a (2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, because it does not result in an increase or decrease in current staffing level requirements. Tasks associated with reporting new incidents types and assisting with the investigation of new reportable incidents are expected to be completed by existing camp staff, and should not be appreciably different than that already required under current requirements.

## NOTICE OF ADOPTION

### State Aid for Public Health Services: Counties and Cities

**I.D. No.** HLT-29-14-00012-A

**Filing No.** 1070

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Parts 30 and 40; and addition of new Part 40 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201, 602, 603, 619, 2201, 2202 and 2276

**Subject:** State Aid for Public Health Services: Counties and Cities.

**Purpose:** To modernize certain regulations, including standards of performance for eligible public health services.

**Substance of final rule:** Article 6 of the Public Health Law (PHL) sets forth the statutory framework for the Departments' State Aid program, which partially reimburses local health departments (LHDs) for eligible expenses related to specified public health services. The objectives of these amendments is to conform the State Aid regulations to recent statutory changes to PHL Article 6; clarify, simplify, and reorganize all of the regulations; and to modernize certain regulations, including standards of performance for eligible public health services.

The Department does not expect the non-conformance amendments to result in any significant increased costs. The proposed regulations were developed with considerable input from New York State Association of County Officials (NYSACHO), through numerous meetings. NYSACHO has not indicated that these regulations, which aim to reduce administrative burdens on LHDs, will result in any significant increased costs.

The regulations implementing the State Aid program are set forth in 10 NYCRR Part 39 and Subparts 40-1 and 40-2. Part 39 and Subpart 40-1 establish the administrative aspects of State Aid, including the application and payment mechanisms. Subpart 40-2 establishes the standards of performance for eligible public health services.

These regulations repeal Part 39 and Subparts 40-1 and 40-2 in their entirety. New Subparts 40-1 and 40-2 are issued. The relevant provisions of Part 39 are incorporated into a new Subpart 40-1; accordingly, Part 39 is not being reissued.

With this in mind, these regulatory amendments can be organized into three categories:

- Conformance Changes, for changes necessary to conform the regulations to the recent statutory changes to Article 6 of the PHL;
- Non-conformance Changes – Administrative, for changes to the administrative aspects of State Aid, currently set forth in Part 39 and Subpart 40-1, and now provided solely in Subpart 40-1; and
- Non-conformance changes – Standards of Performance, for changes to the performance standards for core public health services, set forth in Subpart 40-2.

The conformance changes can be summarized as follows:

- All references to the "Municipal Public Health Services Plan" (MPHSP) and Fee and Revenue Plan are removed.
- The regulations describing the State Aid Application (SAA) are amended to reflect that the SAA is now comprised of the following sections: an organizational chart and list of the number of employees providing public health services; a proposed budget; a description of how the LHD will provide public health services; an attestation by the chief executive officer of the municipality that sufficient funds have been appropriated to provide public health services; an attestation by the public health commissioner or director that the LHD has exercised due diligence in reviewing the SAA and that the application seeks State Aid only for eligible public health services; a list of public health services provided by the LHD that are not eligible for State Aid; a projection of fees and revenues to be collected for public health services eligible for State Aid and any other information or documents required by the commissioner.
- The regulation describing the duties of the local commissioner of health or public health director is revised to reflect that such official may serve as the head of a merged agency or multiple agencies if approved by the commissioner, or serve as the local commissioner of health or public health director of additional counties when authorized pursuant to section 351 of the PHL.
- The definition of "maintenance of effort"—i.e., the funding level at which an LHD must maintain services—and the calculation of the penalty for failing to comply, have been simplified.
- Subpart 40-2, which provides the standards of performance for public

health services required for State Aid eligibility, is updated to include the following six core public health services: Family Health, Communicable Disease Control, Chronic Disease Prevention, Community Health Assessment, Environmental Health, and Emergency Preparedness and Response. In particular, Chronic Disease Prevention and Emergency Preparedness, which had been a subset of "Disease Control", are now distinct core services. Public Health Education, which was a distinct core service, has been eliminated and the activities incorporated into each of the core services.

The non-conformance administrative changes to Subpart 40-1 involve significant simplification, clarification, and reorganization of all related provisions. For example, the existing sections relating to fees and revenues are updated and clarified. The regulations clarify that LHDs must make reasonable efforts to collect fees and revenue. The provisions setting forth the activities that are ineligible for State Aid is moved to Subpart 40-2, reorganized and clarified. These and other administrative changes to Subpart 40-1 are described in more detail in the Regulatory Impact Statement.

The non-conformance changes to the performance standards in Subpart 40-2 can be summarized as follows:

- The Family Health core service is amended to focus services in the following areas: Child Health, Maternal and Infant Health, and Reproductive Health sections.
- The requirements of the Chronic Disease Prevention core service are revised to focus LHDs on working with community partners to implement policy rather than on providing direct patient care.
- In the Communicable Disease Prevention core service, the section relating to General Communicable Disease control is amended to reflect best practices, which include requiring LHDs to provide communications to health care providers, clinics and laboratories on how to decrease the spread of communicable disease. The sections on Sexually Transmitted Diseases and Human Immunodeficiency Virus are consolidated.
- The Community Health Assessment section now requires LHDs to create a Community Health Improvement Plan.
- The requirements of the Environmental Health core service are simplified.
- A new core service, Emergency Preparedness and Response, is added to reflect the LHD's active role in assuring the community is adequately prepared to respond to emergencies.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 40-2.3, 40-2.11, 40-2.22 40-2.23, 40-2.53, 40-2.55, 40-2.58, 40-2.62 and 40-2.70.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.ny.gov

**Revised Regulatory Impact Statement, Revised Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

#### **Assessment of Public Comment**

The Department received comments from the New York State Association of County Health Officials (NYSACHO) and the New York City Department of Health and Mental Hygiene (DOHMH), during the public comment period ending September 9, 2014. A summary of the comments and the Department's responses are as follows:

NYSACHO

Comment:

The Department has proposed several policies in relation to the State Aid Application process that would increase the administrative burden on local health departments.

Response:

NYSACHO refers to certain administrative actions undertaken by the Department which it believes has caused increased burden and costs to LHDs. The policies or actions referred to are not required by the proposed regulations. The Department will consider these concerns during the development of the State Aid Application.

Comment:

Proposed section 40-1.61 eliminates a provision that would permit the Commissioner to annually distribute excess State Aid funds to the Local Health Departments (LHDs). NYSACHO requests that this language be reinstated.

Response:

The State Aid program partially reimburses LHDs for eligible expenses related to specified public health services. The provision in regulation related to disbursement of funds appropriated but not utilized for reimbursement has not been used for many years. The Department declines to reinstate it.

Comment:

Proposed section 40-2.3(a)(2) would deem ineligible for State Aid activities under the following category: "Activities carried out by any other agency. The cost of activities for which any other government agency has been given legal responsibility." NYSACHO commented that this language could be interpreted as prohibiting another county agency from providing public health services under the direct supervision of the local health official. The following revision was suggested: "The cost of activities for which any other government agency has been given legal responsibility and for which no legal responsibility otherwise exists for services provided under Public Health Law Article Six by local health departments."

Response:

Article 6 funding is only available to LHDs and cannot be used to reimburse activities carried out by another agency. Accordingly, this provision was not revised.

Comment:

There is a discrepancy in the language in two provisions regarding the ineligibility of certain chronic disease related activities. Specifically, section 40-2.3(b)(1)(9) includes the word "prevention", whereas section 40-2.30(b) does not. NYSACHO recommends that the word "prevention" be removed from section 40-2.3(b)(1)(9).

Response:

The Department agrees that there is a discrepancy and has made this clarifying change.

Comment:

Proposed section 40-2.11, regarding Family Health services, is not clear as to the settings in which these services should be provided.

Response:

This section has been clarified to provide that the services listed in subdivisions (a), (c), (d) are to be provided in a clinic setting, whereas the services listed in subdivision (b) are public health home visits.

Comment:

Proposed section 40-2.70, relating to Emergency Preparedness and Response, should be amended to allow reimbursement for all emergency preparedness and response activities—not just those related to health emergency preparedness and response.

Response:

The Department intends that only health emergency and response activities are eligible for State Aid. Accordingly, this section was not revised.

DOHMH

Comment:

Section 40-2.22 (Communicable Disease Control)

The proposed section would require that LHDs maintain a program that complies with disease specific protocols, as established by the State Department of Health. DOHMH observed that New York City is statutorily exempt from much of Article 21 of the Public Health Law, which concerns communicable disease control, and that it has established its disease specific protocols pursuant to local regulation. DOHMH requested that this section be revised to provide that DOHMH may comply with its local requirements, rather than those established by the Department.

Response:

The Department agrees and has clarified this section to reflect DOHMH's status under Article 21 of the Public Health Law.

Comment:

Section 40-2.23 (Immunization)

The proposed section would require all LHDs to ensure "compliance with the NYSIIS reporting requirements." However, certain NYSIIS requirements do not apply to DOHMH (see, e.g., Public Health Law § 2168 and 10 NYCRR 66-1.2). DOHMH requested that the provision be amended to reflect DOHMH's requirements with respect to NYSIIS reporting.

Response:

The Department agrees and has clarified this language to state that LHDs must improve compliance with NYSIIS reporting requirements "as applicable."

Comment:

Section 40-2.53 (Realty subdivisions)

The proposed section would require all LHDs to maintain a program for approving realty subdivisions and assuring construction is in accordance with approved plans. In New York City, however, this activity is performed by the Buildings Department and City Planning, rather than DOHMH. DOHMH requested that the provision be qualified to reflect this arrangement.

Response:

The Department agrees and has qualified the provision to reflect this arrangement, which is specific to New York City.

Comment:

Section 40-2.55 (Nuisances)

The proposed section would require all LHDs to maintain a program

that complies with the public health nuisance provisions set forth in Part 8 of the State Sanitary Code. DOHMH observed that New York City is exempt from much of Article 13 of the Public Health Law, concerning nuisances, and that it responds to nuisances in accordance with local regulations. DOHMH requested that the reference to Part 8 be removed.

Response:

The State Sanitary Code applies to all LHDs. However, LHDs may adopt provisions that are at least as protective as the State Sanitary Code. Accordingly, this section was clarified by requiring that LHDs maintain a program that is consistent with Part 8, "as applicable." The Department does not interpret this regulation as requiring New York City to change its nuisance response activities. Nuisance abatement continues to be ineligible for State Aid.

Comment:

Section 40-2.58 (Lead Poisoning)

The proposed section provides that the local health department shall maintain a lead poisoning program that reports blood lead testing information in a manner acceptable to the State Commissioner of Health. DOHMH requested that this section be revised to clarify that it does not limit the jurisdiction of an LHD to require additional reporting in accordance with local law.

Response:

The intent of this provision in the proposed regulation was not to limit the jurisdiction of an LHD to require additional reporting in accordance with its own local law. The Department has clarified this section accordingly.

Comment:

Section 40-2.62 (Authorized Tanning Facilities)

The proposed section would require authorized LHDs to operate a tanning facility licensing and inspection consistent with 10 NYCRR Subpart 72-1. However, Subpart 72-1 allows the LHD to adopt local regulations that are at least as protective as the State regulations. DOHMH commented that this section should be clarified to reflect that, where the LHD has adopted such local regulations, it must comply with such regulations as a condition of State Aid eligibility.

Response:

The Department agrees and has clarified this section accordingly.

## NOTICE OF ADOPTION

### Integrated Outpatient Services

**I.D. No.** HLT-41-14-00022-A

**Filing No.** 1071

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 404 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2803

**Subject:** Integrated Outpatient Services.

**Purpose:** To establish standards applicable to programs licensed or certified by the DOH, OMH or OASAS to add existing program services.

**Substance of final rule:** The Proposed Rule relates to standards applicable to programs licensed or certified by the Department of Health (DOH; Public Health Law Article 28), Office of Mental Health (OMH; Mental Hygiene Law Articles 31 and 33) or Office of Alcoholism and Substance Abuse Services (OASAS; Mental Hygiene Law Articles 19 and 32) which desire to add to existing programs services provided under the licensure or certification of one or both of the other agencies.

§ 404.1 Background and Intent. This section speaks to the background and intent of the Proposed Rule as applicable to all three agencies (DOH, OMH, and OASAS). The purpose of the Rule is to promote increased access to physical and behavioral health services at a single site and to foster the delivery of integrated services based on recognition that behavioral and physical health are not distinct conditions.

§ 404.2 Legal Base. This section provides the Legal Base applicable to all three agencies for the promulgation of this Proposed Rule.

§ 404.3 Applicability. This section identifies providers of outpatient services or programs to which the standards outlined in the Proposed Rule would apply (e.g., providers certified or licensed, or in the process of pursuing licensure or certification, by at least two of the participating state agencies). Such providers would continue to maintain regulatory standards applicable to the host program's license or certification.

§ 404.4 Definitions. This section provides definitions as used in the Proposed Rule which would be applicable to any program licensed or certified by any of the three participating state agencies and identified as the

host (program requesting the addition of services). Definitions specific to a host program's licensing agency are found in regulations of that agency. Among other things, the section defines an "integrated services provider" as a provider holding multiple operating certificates or licenses to provide outpatient services, who has also been authorized by a commissioner of a state licensing agency to deliver identified integrated care services at a specific site in accordance with the provisions of this Part.

§ 404.5 Integrated Care Models. This section describes three (3) models for host programs: (a) Primary Care Host Model with compliance monitoring by DOH; (b) the Mental Health Behavioral Care Host Model with compliance monitoring by OMH; and (c) the Substance Use Disorder Behavioral Care Host Model with compliance monitoring by OASAS.

§ 404.6 Organization and Administration. This section requires any integrated services provider to be certified by the appropriate state agency and to revise any practices, policies and procedures as necessary to ensure regulatory compliance.

§ 404.7 Treatment Planning. This section requires treatment planning for any patient receiving behavioral health services (OMH and/or OASAS) from an integrated service provider and articulates the scope, standards and documentation requirements for such treatment plans including requirements of managed care plans where applicable.

§ 404.8 Policies and procedures. This section identifies minimum required policies and procedures for any integrated service provider.

§ 404.9 Integrated Care Services. This section identifies the minimum services required of any integrated services provider providing any of the three care models. The section also identifies services for each model which may be provided at an integrated services provider's option.

§ 404.10 Environment. This section outlines minimum physical plant requirements necessary for certifying existing facilities which want to provide integrated care services. The section requires programs seeking certification after the effective date of this Rule or who anticipate new construction or significant renovations to comply with requirements of 10 NYCRR Parts 711 (General Standards of Construction) and 715 (Standards of Construction for Freestanding Ambulatory Care Facilities).

§ 404.11 Quality Assurance, Utilization Review and Incident Reporting. This section outlines the requirements and obligations of an integrated service provider relative to QA/UR and Incident Reporting and are detailed by the type of model as the host program.

§ 404.12 Staffing. This section outlines staffing requirements by type of model as the host program and identifies specific requirements which may be unique to the primary care host model such as subspecialty credentials of a medical director.

§ 404.13 Recordkeeping. This section requires that a record be maintained for every individual admitted to and treated by an integrated services provider. Additional requirements include designated recordkeeping staff, record retention, and minimum content fields specific to each model. Confidentiality of records is assured via patient consents and disclosures compliant with state and federal law.

§ 404.14 Application and Approval. This section outlines the process whereby a provider seeking to become an integrated service provider may submit an application for review and approval. Applications are standardized for use by all three licensing agencies but shall be reviewed by both the agency that regulates the services to be added and the agency with authority for the host clinic. The section identifies minimum standards for approval.

§ 404.15 Inspection. This section requires the state licensing agency with authority to monitor the host clinic to have ongoing inspection responsibility pursuant to standards outlined in this Proposed Rule. The adjunct state licensing agency will not duplicate inspections for license renewal or compliance but shall be consulted about any deficiencies relative to the added services. The section identifies specific areas of review and requires one unannounced inspection prior to renewal of an Operating Certificate or License.

A copy of the full text of the regulatory proposal is available on the DOH website at: [http://www.health.ny.gov/regulations/proposed\\_rulemaking](http://www.health.ny.gov/regulations/proposed_rulemaking).

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 404.3, 404.7, 404.10 and 404.11.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: [regsqa@health.ny.gov](mailto:regsqa@health.ny.gov)

**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

### Assessment of Public Comment

The Office of Alcoholism and Substance Abuse Services (OASAS), Office of Mental Health (OMH) and Department of Health (DOH)

received public comments from three provider associations. A fourth set of comments was received from a provider association after the due date. Many of the comments in this late submission were duplicated by other commenters. All comments received were assessed jointly by the three state agencies and are addressed more fully below.

1. Commenters had concerns over not designating a lead agency for the application process and questioning whether a providers wanting to add primary care will need to complete a DOH Certificate of Need (CON) application.

Response: The agencies have developed a web based single application that will be transmitted to all three agencies simultaneously. Providers will be contacted by the involved agencies and may be asked for additional information as necessary. The state licensing agency that originally licensed the site in question will advise the provider of the ultimate determination. There is no separate CON application needed for providers wanting to add primary care.

2. Commenters suggested the regulations are overly restrictive in requiring dual licensure/certification and suggested expanding integrated services to entities that hold only one license/certification, similar to what will be available under Delivery System Reform Incentive Payment (DSRIP) program.

Response: These regulations represent only one model of integrated care, which allows providers who are already licensed or certified by more than one agency to add services at one of their sites without needing to obtain a second license or certification. This allows the agencies to expedite approval and streamline oversight at the site where additional services are added. There are other models of integrated care available to providers, including proceeding under the current allowable thresholds or, for those providers participating in DSRIP, requesting regulatory waivers.

3. A commenter requested that integrated providers, particularly federally qualified health centers (FQHCs), be permitted to be reimbursed for multiple threshold visits per day.

Response: These regulations do not effectuate any change for reimbursement of outpatient services. Integrated providers, including FQHCs that have opted into APGs, can bill using the APG Medicaid reimbursement methodology which permits billing of multiple procedures within a single visit. Generally, integrated providers, including FQHCs are encouraged to bill using the APG reimbursement methodology which enables providers to bill for all the procedures/services rendered on a date of service on a single claim. The Department will undertake consideration of additional mechanisms for billing by FQHCs that do not utilize APGs.

4. A commenter recommended eliminating the requirement for physical separation of space between types of service providers.

Response: Under the regulations (14 NYCRR 825.10(c)(1)(i), 14 NYCRR 599-1.10(c)(1)(i) and 10 NYCRR 404.10(c)(1)(i)), examination rooms must be generally available during the hours when primary care services are offered. Such rooms can be used for behavioral health services if not being used for primary care services at that time and if appropriate for the services.

5. A commenter asked whether the boards of integrated providers must include all clinical areas of expertise which they provide.

Response: This is not specifically required by the regulations; however, providers will need to ensure that they are capable of carrying out the requirements that “the established governing bodies of licensed integrated service shall be legally responsible for quality of care and compliance with all applicable laws and regulations.” 14 NYCRR 825.6(b), 14 NYCRR 599-1.6(b) and 10 NYCRR 404.6(b).

6. A commenter requested clarification of the requirement that treatment plans identify each diagnosis for which a patient is being treated.

Response: Treatment plans may be integrated. To the extent they are, all diagnoses for which a patient is being treated should be included in the plan. The agencies are developing a guidance document which will provide additional instructions in treatment plan development.

7. A commenter noted that while the proposed regulations require that periodic reviews of treatment plans include “an evaluation of physical health status” the reviews also should include adjustments to address physical health needs.

Response: 14 NYCRR 825.7(g)(3), 14 NYCRR 599-1.7(g)(3) and 10 NYCRR 404.7(g)(3) apply to treatment plan reviews. By definition a review would include any necessary adjustments to the plan including those required to address shifting physical health needs. No change will be made.

8. Commenters requested clarification of how many professionals are required to sign a treatment plan under 14 NYCRR 825.7(g)(4), 14 NYCRR 599-1.7(g)(4) and 10 NYCRR 404.7(g)(4). Requiring multiple professionals to sign a treatment plan would be burdensome.

Response: Only one responsible staff member involved in the patient’s care needs to sign the treatment plan. The regulations have been clarified.

9. Commenters asked why primary care excludes OB/GYN services.

Response: The regulations (14 NYCRR 825.9(a)(2)(iv), 14 NYCRR

599-1.9(a)(2)(v) and 10 NYCRR 404.9(a)(2)(v)) provide that for behavioral health care models primary care services provided within the specialty of OB/GYN are limited to routine gynecologic care and family planning provided pursuant to 10 NYCRR Part 753. Other OB/GYN services are considered specialty care beyond the scope of what should be offered in these settings.

10. A commenter asked why there are different criteria for how a provider will be determined to be “in good standing” based on the licensing agency.

Response: The regulations set forth a process for expediting approval of the addition of services at a site in lieu of licensure or certification by a second agency; therefore, the provider needs to be in good standing according to the standards of each agency by which it is licensed or certified. All providers will be evaluated using the same criteria after they have been approved to deliver integrated services.

11. A commenter asked why the regulations require integrated providers to be members of a Health Home if being a member of a DSRIP performing provider system (PPS) would be sufficient.

Response: The enabling legislation derives from Health Home legislation and therefore Health Home affiliation is required. The objective of the integrated services initiative are consistent with the objective of the health homes program. Membership in a DSRIP PPS alone is not sufficient.

12. A commenter asked if unannounced inspections occur prior to approval for joint licensure or only prior to renewal?

Response: The inspections contemplated by 14 NYCRR 825.15, 14 NYCRR 599-1.15 and 10 NYCRR 404.15 will occur after approval.

13. A commenter raised a concern about the ability of “busy clinical staff” to meet with agency inspectors and provide requested clinical records.

Response: A key benefit to the integrated licensure regulations is that clinics providing services of multiple State agencies will only be subject to an inspection by one (“host”) State agency, rather than an inspection by each agency. The agencies are mindful of staff time and resources; however to ensure compliance and continued authorization for delivery of integrated services routine inspections are necessary.

14. A commenter asked if fiscal viability reviews will be based on the viability of the integrated services or the entire organization and asked if this requirement could be eliminated.

Response: The requirement is necessary to examine how the operation of an integrated services program will impact the overall fiscal integrity of the provider.

15. A commenter stated that there is duplication and inconsistency between the integrated services regulation and existing regulations for clinics or diagnostic and treatment centers and recommended that 14 NYCRR 825.3(c), 14 NYCRR 599-1.3(c) and 10 NYCRR 404.3(c) be eliminated.

Response: These sections cannot be eliminated because they provide the basis for integrated service providers operating pursuant to the standards of the state agency that initially licensed or certified the provider at the site at which services will be added. The guidance document will provide clarification to the extent any specific inconsistencies are identified.

16. A commenter requested that the definition of primary care services be changed to include “any qualified practitioner working within their defined scope of practice.” Another commenter recommended that the definition of primary care services be expanded to include other professionals.

Response: The regulations were designed to allow providers to add primary care services in certain settings where behavioral health care services are offered. The requested clarification could allow the inclusion of specialty care, which is not appropriate for these settings.

17. Commenters expressed concern that the regulations would restrict providers who do not apply to become an integrated services provider from marketing themselves as delivering integrated services.

Response: These regulations are intended to facilitate one model of delivering integrated care. There is no prohibition on other models that exist or may exist so long as otherwise allowable. 14 NYCRR 825.6(a), 14 NYCRR 599-1.6(a) and 10 NYCRR 404.6(a) have been clarified to reflect this by removing the word “only.”

18. Commenters expressed concerns about the potential conflict between the treatment planning requirements in the regulation and those of Medicaid managed care companies.

Response: The regulations were designed to allow providers to comply with the requirements of Medicaid managed care plans, therefore 14 NYCRR 825.7(c)(2), 14 NYCRR 599-1.7(c)(2) and 10 NYCRR 404.7(c)(2) were clarified by adding “notwithstanding this section.”

19. A commenter asked if the treatment planning section of the regulations replace the treatment planning section in Part 822 or 599.

Response: Providers licensed by OMH or certified by OASAS still need to follow 14 NYCRR Parts 599 and 822, respectively. The treatment plan-

ning section in these regulations applies to the extent that integrated services are offered. The agencies are developing a guidance document that will provide additional instruction in treatment plan development.

20. A commenter stated that the treatment planning requirements of “factors” to be considered (14 NYCRR 825.7(e), 14 NYCRR 599-1.7(e) and 10 NYCRR 404.7(e)) are too prescriptive and should be made more flexible.

Response: The factors identified are critical to ensuring a patient’s behavioral health needs are appropriately assessed and identified and that an acceptable plan of care is developed. These are the minimum factors to be considered and providers may choose to expand on them.

21. A commenter recommended that the language related to discharge planning be eliminated because many patients will never be discharged and always require continuing care.

Response: Planning for “discharge” from behavioral health treatment is a critical part of the treatment planning process. The agencies are developing a guidance document that will provide additional instruction on continuing care and discharge planning.

22. A commenter stated that problem areas in a treatment plan should not be limited to patient-identified problem areas but should also include provider-identified problem areas.

Response: These are the minimum areas to be considered and providers may choose to expand on them and include provider-identified areas.

23. A commenter recommended that that list of identified psychotherapy services identified in 14 NYCRR 825.9, 14 NYCRR 599-1.8 and 10 NYCRR 404.9 should permit the use of telemedicine.

Response: These regulations do not prohibit the use of telemedicine to the extent otherwise permitted.

24. Commenters raised concerns over limiting substance use disorder counseling to two distinct methods, individual and group, both of which require face-to face delivery.

Response: 14 NYCRR 828.9(c)(3), 14 NYCRR 599-1.9(c)(3) and 10 NYCRR 404.9(c)(3) state “Integrated services providers of substance use disorder services shall offer, at a minimum, each of the following services...” The regulations do not prohibit the use of telemedicine to the extent otherwise permitted.

25. Commenters raised concerns over the creation of additional, expensive and/or redundant environmental/physical plant standards and the dichotomy in the standards between providers currently licensed and those licensed after the effective date of the regulations.

Response: The regulations provide additional flexibility to accommodate existing space for providers adding primary care services. Providers with three or fewer examination rooms need to follow only the environmental/physical plant standards as set forth in the new regulations. Prospective providers that have never obtained a license or certification from any of the three agencies prior to the effective date of the new regulations and therefore are not using any licensed or certified space will be required to follow existing Article 28 standards in the provision of primary care.

26. A commenter stated that the creation of additional burdens based on whether there are 3 or less examination rooms creates a potential barrier to behavioral health providers that want to add primary care.

Response: The additional requirements are necessary in settings with over 3 examination rooms to ensure patient health and safety in light of the higher volume of primary care visits.

27. A commenter suggested that the state adopt the 2010 edition of NFPA 101 Life Safety Code instead of referencing the outdated 2000 edition.

Response: The regulations rely on the most recently adopted version of the Life Safety Code but includes categorical waivers that have been issued by CMS based on the 2012 Life Safety Code to provide a standard that is consistent with NFPA current updates.

28. A commenter stated that the quality assurance requirements for providers of primary care should not be in addition to those already required of primary care providers under 10 NYCRR 405.6.

Response: The quality assurance requirements contained in 14 NYCRR 825.11(a)(1), 14 NYCRR 599-1.11(a)(1) and 10 NYCRR 404(a)(1) apply only to those providers adding primary care. They are not additional requirements for Article 28 providers adding behavioral health services.

29. A commenter stated that the regulations have criteria for medical directors where primary care and substance use disorder services are provided but inquired as to whether integrated service providers adding mental health are required to have a medical director. If so, there should be discretion as to whether this is a full-time or part-time medical director.

Response: The regulations require providers adding primary care or substance use disorder services to utilize a medical director. Providers adding mental health services do not have a similar requirement; however, such providers will already have a medical director in place due to their existing licensure or certification by DOH or OASAS.

30. A commenter stated that the development of integrated care records

is essential and recommended that the regulations be amended to state that patient consent to integrated care constitutes compliance with state and federal disclosure requirements.

Response: The regulations reflect the importance of integrated patient records. The regulations do not prohibit the use of patient consent for purpose of providing integrated care. The agencies are developing a guidance document which will provide additional instruction on recordkeeping and consent issues.

31. A commenter seeks clarification on whether the authority to provide integrated services extends system-wide or is site-specific.

Response: The approval is site specific; however providers can have multiple sites approved. There is no limit on the number of sites for which a provider can seek approval.

32. A commenter asked about how the new deeming law authorizing OMH and OASAS to accept hospital accreditation from a national organization in lieu of separate, duplicate state surveys will interact with the survey process for integrated service providers.

Response: The new deeming law has not been operationalized in ambulatory behavioral health settings yet. OMH and OASAS have started to work on a plan to allow deeming in these settings. This plan will address integrated service providers.

33. Commenters raised concerns over billing and rates not being addressed in the regulation and the need to have one billing process to streamline the system.

Response: The agencies will provide Medicaid billing and claiming guidance which addresses the complexities in each service category. Generally, providers will be encouraged to submit a single APG claim for each visit (including those comprising multiple service types) with all the procedures/services rendered on that date of service using the host’s assigned Integrated Services rate codes. Medicaid managed care plans will be notified of the Department of Health’s Medicaid billing/reimbursement policies as they relate to the types integrated services rendered by rendering providers.

34. A commenter stated that CASAC was eliminated from the qualified health professional list in outpatient mental health clinics and recommended that CASACs should be part of the joint license for billing purposes.

Response: Currently CASAC’s are not considered qualified health professionals in OMH and DOH clinics. CASACs can be used for delivery of substance use disorder services in any approved integrated setting that has authority from OASAS to deliver substance use disorder services, provided that all other applicable staffing requirements are met.

35. A commenter recommended adding language to the policies and procedures section about using electronic medical records and sharing information.

Response: The regulations do not prohibit electronic medical records and information sharing. The manner of recordkeeping is left up to the provider.

36. A commenter asked why group counseling for substance use disorder treatment is limited to 15 people when there is no such limit for other disciplines.

Response: These requirements are consistent with current OASAS requirements and best practices in substance use disorder treatment.

37. A commenter requested clarification of “staff and appropriate equipment” needed to deliver primary care services.

Response: Provider must ensure that they have the staff and equipment necessary to provide services that are consistent with prevailing standards of care.

38. A commenter asked what the periodic reviews of primary care services with behavioral health services entail in the context of a quality assurance program.

Response: Periodic reviews are required as part of a provider’s quality assurance program, which must be designed to verify that providers have processes in place for the provision of quality and appropriate care.

39. A commenter recommended that the quality assurance, utilization review and incident reporting sections be consolidated into a single set as they are overly burdensome and do not foster true integration.

Response: These sections were designed to promote flexibility for participating providers.

## NOTICE OF ADOPTION

### Accountable Care Organizations (ACOs)

**I.D. No.** HLT-41-14-00023-A

**Filing No.** 1072

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 1003; and amendment of Subpart 98-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, art. 29-E and section 4403(2)

**Subject:** Accountable Care Organizations (ACOs).

**Purpose:** To promote ACOs and establish a certification process to regulate the use of ACOs to deliver an array of health care services.

**Substance of final rule:** These proposed regulations would: (1) add a new Part 1003 to 10 NYCRR, entitled "Accountable Care Organizations," to establish standards for the issuance of certificates of authority by the Commissioner of Health (Commissioner) to Accountable Care Organizations (ACOs); and (2) amend Part 98 of 10 NYCRR, entitled "Managed Care Organizations," to make conforming changes to provisions related to Independent Practice Associations.

Part 1003 (Accountable Care Organizations)

Section 1003.1 (Applicability) provides that Part 1003 applies to persons or entities seeking certification as an ACO. The section further specifies that no application is required for a Medicare-only ACO whose contract with CMS does not permit shared losses to exceed 10 percent. This applies to the ACOs approved by CMS to participate in the Medicare Shared Savings Program. Such a Medicare-only ACO may receive certification through an expedited process and will be subject only to § 1003.6 (Legal Structure and Responsibilities), 1003.11 (Payment and Third Party Payers), 1003.12 (Termination), 1003.13 (Reporting) and 1003.14 (Legal Protections) of Part 1003. Similarly, a Medicare-only ACO whose contract with CMS allows shared losses to exceed 10 percent may receive certification through an expedited process and will be subject to the aforementioned provisions as well as § 1003.5 (Medicare-Only ACOs Sharing Losses).

Section 1003.2 (Definitions) sets forth definitions for certain terms. In particular, an "ACO" is defined as "an organization comprised of clinically integrated independent health care providers that work together to provide, manage, and coordinate health care (including primary care) for a defined population; with a mechanism for shared governance; the ability to negotiate, receive, and distribute payments; and to be accountable for the quality, cost, and delivery of health care to the ACO's patients and has been issued a "certificate of authority" by the Commissioner.

Section 1003.3 (Certificate of Authority) establishes the criteria that must be satisfied for the Commissioner to approve a certificate of authority. Among other things, the ACO must demonstrate the capability to provide, manage and coordinate health care for a defined population, and its operation must include the participation of clinically integrated health care providers and administrative support organizations that are accountable for the quality, cost and delivery of health care to the individuals it serves.

Section 1003.4 (Application Requirements) provides that a person or entity seeking to obtain a certificate of authority must submit an application on forms prescribed by the Commissioner.

Section 1003.5 (Medicare-Only ACOs Sharing Losses) applies only to a Medicare-only ACO which may have shared losses that exceed ten percent of the benchmark established under its contract with CMS (meaning ACOs that participate in the Pioneer Program). The section allows such Medicare-only ACOs the ability to share losses without having to obtain an insurance license, subject to meeting several stringent financial conditions.

Section 1003.6 (Legal Structure and Responsibilities) sets forth requirements pertaining to the legal structure of an ACO, and provides that an approved ACO must provide, manage and coordinate health care for a defined population; be accountable for quality, cost, and delivery of health care to ACO patients; negotiate, receive and distribute any shared savings or losses; and establish, report and ensure provider compliance with health care criteria including quality performance standards. The section also requires that providers that participate in an ACO provide notification of such to their patients.

Section 1003.7 (Governing Body) requires that the governing body of an ACO have a transparent governing process and be responsible for the oversight and strategic direction of the ACO, holding those responsible for management of the ACO accountable for the ACO's activities.

Section 1003.8 (Leadership and Management) provides that an ACO must have a leadership and management structure that supports the delivery of an array of health care services for the purpose of improving quality of care, health outcomes and coordination and accountability of services provided to patients.

Section 1003.9 (Quality Management and Improvement Program) requires ACOs to develop and implement a quality management and improvement program that identifies, evaluates and resolves quality related issues.

Section 1003.10 (Quality Performance Standards and Reporting) provides that the Department of Health ("Department") shall collect from ACOs data related to quality assurance reporting requirements, which will

be developed by the Department in conjunction with the National Committee on Quality Assurance. The ACO will be afforded the opportunity to review the information and correct any errors, and then the information will be posted on the Department's public website. The section also provides that the ACO must demonstrate quality performance equal to or above statewide and/or national benchmarks.

Section 1003.11 (Payment and Third Party Health Care Payers) sets forth requirements for ACOs that enter into payment arrangements with a third party health care payer. In particular, the section clarifies that unless an ACO is licensed as an insurer under the Insurance Law or certified under Article 44 of the Public Health Law, the ACO is prohibited from engaging in any activity that would constitute the business of insurance under Insurance Law § 1101, except as provided in § 1003.11(b)(1) and (2).

Section 1003.12 (Termination) specifies that the Commissioner may limit, suspend or terminate the certificate of authority of an ACO after written notice and an opportunity for review and/or hearing. The section provides, among other things, that the failure to adhere to established quality measures or comply with corrective action plans related to poor performance on established quality of care standards constitute grounds for termination.

Section 1003.13 (Reporting) requires ACOs to submit data to the Commissioner annually and as otherwise requested. The data requested would include information about ACO participants and enrollees, utilization of services, complaints and grievances, quality metrics and shared savings or losses.

Section 1003.14 (Legal Protections; State Action Immunity) reflects the statutory intent to promote ACOs by excluding them from the application of certain provisions that might otherwise inhibit such arrangements:

- ACOs certified pursuant to Part 1003 shall not be considered to be in violation of Article 22 of the General Business Law relating to contracts or agreements in restraint of trade, if the ACO's actions qualify for the safety zone, subject to the antitrust analysis set forth in the Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program issued by the Federal Trade Commission and U.S. Department of Justice and published in the Federal Register on October 28, 2011. (§ 1003.14(a));

- As part of its application for a certificate of authority under this part, an ACO may request that the State provide state action immunity from federal and state antitrust laws;

- ACOs certified pursuant to Part 1003 shall not be considered to be in violation of Education Law Article 131-A relating to fee splitting when certain criteria are satisfied (§ 1003.14(b));

- Health care providers shall not be considered to be in violation of Title 2-D of Article 2 of the Public Health Law when making referrals to other health care practitioners that are part of their ACO activities (§ 1003.14(c));

- Medicaid providers that enter into arrangements with an ACO, one or more of its ACO participants or its ACO providers/suppliers, or a combination thereof shall not be in violation of Social Services Law ("SSL") § 366-d (§ 1003.14(d)); and

- The provision of health care services by an ACO shall not be considered the practice of a profession under Education Law Title 8 (§ 1003.14(f)).

Part 98 of NYCRR (Managed Care Organizations)

Section 98-1.2(w) is amended to expand the definition of an IPA to allow certification as an ACO pursuant to PHL Article 29-E and Part 1003 and provide that if so certified, the IPA may contract with third party health care payers.

Section 98-1.5(b)(vii)(f) is amended to provide that an IPA may seek certification as an ACO pursuant to PHL Article 29-E and Part 1003 and, if so certified, must comply with all the requirements of Part 1003, including but not limited to the requirements of § 1003.6(e) and (g). Upon receiving such certification, an IPA acting as an ACO may contract with third party health care payers. § 98-1.5(b)(vii)(f).

Section 98-1.5(b)(vii)(g) is added to provide that an IPA may include any and all necessary powers and purposes as authorized, allowed or required under an approved Delivery System Reform Incentive Payment ("DSRIP") Program.

A copy of the full text of the regulatory proposal is available on the Department of Health website ([www.health.ny.gov](http://www.health.ny.gov)).

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 1003.2, 1003.3, 1003.4, 1003.5, 1003.7, 1003.10 and 1003.14.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: [regsqa@health.ny.gov](mailto:regsqa@health.ny.gov)

**Revised Regulatory Impact Statement, Revised Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

**Assessment of Public Comment**

A Notice of Proposed Rule Making was initially published in the State Register on October 15, 2014. During the public comment period, comments were received from several health care providers, an association of behavioral health care providers, a hospital association, a health plan association, an accrediting organization, several organizations advocating on behalf of health care consumers, and legislators. Clarifications and technical, non-substantive changes have been made to the regulations in light of the comments received. The regulations will take effect today pursuant to a Notice of Adoption filed in today's State Register. Copies of the full text of the regulations and the full assessment of public comments are available on the Department of Health's website.

All comments received were reviewed and evaluated. In response to comments, 10 NYCRR § 1003.2 has been revised to: (1) include a definition of "health care provider" which utilizes the definition in PHL § 2999-o(6) instead of referring to PHL Article 29-E; (2) refer to "care coordination" rather than "care management" in the definition of "administrative services organization;" (3) add a reference to "an arrangement for such payments or prepayments" in the definition of a "capitation arrangement;" (4) change a reference from "systemic" to "systematic" in the definition of "clinical integration;" (5) move the definition of "guaranteeing parent corporation" to § 1003.5, which is the only place the term is referenced, and clarify that the definition should not be construed as permitting such entity to exercise control over the ACO's governing board with respect to ACO operations; (6) clarify that the reference to the "population" in the definition of "shared losses" means the "defined population;" (7) clarify that the referenced certification of a "qualified health information technology entity" would mean a QE certification process recognized by the Commissioner of Health; and (8) clarify that a "third party payer" has its ordinary meanings, as set forth in PHL § 2999-o.

10 NYCRR § 1003.3 has been revised so that in addition to the information included in the application, the Commissioner shall consider any other relevant information known to him or her. 10 NYCRR § 1003.4 has been revised to require "proposed organizational documents" in lieu of organizational documents in case such documents are not yet final. 10 NYCRR § 1003.10 has been revised to clarify that the required statement about the accuracy of data applies to the ACO data that will be published on the Department's website, as set forth in the preceding paragraph. 10 NYCRR § 1003.14 is revised to explicitly advise ACOs that the failure to comply with any requirements imposed by the Department in connection with its active supervision could impact their immunity.

Several proposed revisions were not incorporated because they were not consistent with the statutory authority underlying the proposed rulemaking. Other suggestions appeared to warrant further consideration for possible inclusion of future revisions to the regulations.

The full Assessment of Comments is available on the Department of Health's website at [www.health.ny.gov](http://www.health.ny.gov).

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Medical Use of Marihuana**

**I.D. No.** HLT-52-14-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of Subpart 55-2; and addition of Subpart 80-1 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3369-a

**Subject:** Medical Use of Marihuana.

**Purpose:** To comprehensively regulate the manufacture, sale and use of medical marihuana.

**Substance of proposed rule (Full text is posted at the following State website: [www.health.ny.gov](http://www.health.ny.gov)):** As required by section 3369-a of the Public Health Law ("PHL"), Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register. A new subpart 80-1 is added to read as follows:

§ 80-1.1 Practitioner registration. Establishes a process for practitioners who have completed an educational course approved by the Commissioner on the use of medical marihuana under Title V-A of the Public Health Law to register with the department to issue patient certification.

§ 80-1.2 Practitioner issuance of certification. Establishes a process for registered practitioners to issue a certification to patients with certain severe debilitating or life-threatening conditions, with certain clinically associated conditions or complications, that are likely to receive therapeutic or palliative benefit from the treatment of medical marihuana to be able to receive approved medical marihuana products from a registered organization.

§ 80-1.3 Application for registration as a certified patient. Provides the criteria by which a person may obtain a registration as a certified patient and receive a registry identification card.

§ 80-1.4 Designated caregiver registration. Caregivers designated to handle approved medical marihuana products on behalf of certified patients are required to register with the department according to the procedures detailed in this section and to obtain a registry identification card.

§ 80-1.5 Application for initial registration as a registered organization. Establishes the application process for registered organizations interested in manufacturing and dispensing approved medical marihuana products. Provides that no person or entity shall manufacture or dispense medical marihuana without such registration.

§ 80-1.6 Consideration of registered organization applications. Requires potential registered organizations to submit an application fee of \$10,000, accompanied by a check for an additional \$200,000, the latter of which will be refunded to applicants not selected as registered organizations. Provides that the department shall initially register up to five applicants as registered organizations according to enumerated factors. Requires that the applicant allow for reasonable access to its facilities for inspection by the department. Provides that registrations shall be valid for two years, except that initial registrations may be extended up to eleven months by the commissioner.

§ 80-1.7 Application for renewal of registered organization registrations. Establishes the process by which registered organizations renew their registration. Requires an application fee of \$10,000, accompanied by a check for an additional \$200,000, the latter of which will be refunded to applicants not granted renewal registration. Provides an opportunity to submit additional information or to demand a hearing for applicants not granted renewal registration.

§ 80-1.8 Registrations non-transferable. Prohibits the transfer or assignment of registrations issued under this subpart.

§ 80-1.9 Failure to operate. Provides that a registration shall be surrendered to the department if a registered organization fails to begin operations to the satisfaction of the department within six months of the issuance of a registration.

§ 80-1.10 Registered organizations; general requirements. Lists requirements for registered organizations, including making its books and facilities available for monitoring by the department; submitting medical marihuana product samples to the department for quality assurance testing; implementing policies and procedures to investigate complaints and adverse events; as well as closure procedures.

§ 80-1.11 Manufacturing requirements for approved medical marihuana product(s). Contains requirements for the manufacturing of medical marihuana products. Provides the brands, forms and routes of administration of medical marihuana products authorized for manufacturing, as well as product labeling requirements. Provides that no synthetic marihuana additives shall be used in the production of any medical marihuana product.

§ 80-1.12 Requirements for dispensing facilities. Details the requirements for the operation of dispensing facilities as well as the required patient specific label required to be affixed to each medical marihuana product dispensed. Provides that no medical marihuana product shall be consumed or vaporized on the premises of such facilities.

§ 80-1.13 Security requirements for manufacturing and dispensing facilities. Details the minimum security requirements for manufacturing and dispensing facilities and for the transportation of medical marihuana products.

§ 80-1.14 Laboratory testing requirements for medical marihuana. Details the minimum laboratory testing requirements for medical marihuana products. Testing shall be performed by a DOH approved laboratory located within NYS.

§ 80-1.15 Pricing. Requires registered organizations submit proposed prices for medical marihuana products to the department for approval. The department may approve the proposed price, refuse approval of a proposed price, or modify or reduce the proposed price.

§ 80-1.16 Medical marihuana marketing and advertising by registered organizations. Restricts the marketing and advertising of medical marihuana.

§ 80-1.17 Reporting dispensed medical marihuana products. Details reporting requirements for dispensed medical marihuana products.

§ 80-1.18 Prohibition of the use of medical marihuana in certain places. Restricts the vaporization of medical marihuana in certain places.

§ 80-1.19 Reporting requirements for practitioners, patients and designated caregivers. Details reporting requirements for practitioners related to changes in circumstances affecting the patient's certification. Defines reporting requirements for patients and designated caregivers for scenarios where certain information contained on the patient certification changes or if the certified patient or designated caregiver loses his or her registry identification card.

§ 80-1.20 Proper disposal of medical marijuana products by patients or designated caregivers. Details the required disposal procedures for medical marijuana products.

§ 80-1.21 General prohibitions. Contains general prohibitions.

§ 80-1.22 Practitioner prohibitions. Lists prohibitions on practitioners.

§ 80-1.23 Designated caregiver prohibitions. Lists prohibitions on designated caregivers.

\* \* \*

Subpart 55-2 is amended as follows:

§ 55-2.2 Certificates of approval. Paragraph 5 is renumbered paragraph 6 and a new paragraph 5 is added to provide for certification of laboratories to test medical marijuana.

§ 55-2.15 Requirements for laboratories performing testing for medical marijuana. Adds requirements for laboratories.

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Summary of Regulatory Impact Statement

Statutory Authority:

Chapter 90 of the Laws of 2014 amended Article 33 of the Public Health Law to add a new Title V-A. Title V-A of the Public Health Law sets forth the requirements for manufacturing, dispensing and making available to certified patients, medical marijuana. The Commissioner is authorized pursuant to Section 3369-a of the Public Health Law to promulgate rules and regulations necessary to effectuate the provisions of Title V-A of Article 33 of the Public Health Law.

Legislative Objectives:

In enacting Title V-A, the legislative objective was to establish a comprehensive program for the manufacture, sale and use of medical marijuana by striking a balance between potentially relieving the pain and suffering of those individuals suffering from a serious medical condition as defined in Section 3360(7) of the Public Health Law and protecting the public against risks to its health and safety.

Needs and Benefits:

The proposed regulations implement the medical marijuana program established in Title V-A of Article 33 of the Public Health Law. They promote the safe and effective use of approved medical marijuana products while safeguarding against diversion and other public safety concerns.

Compliance Costs:

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

There will be costs associated with the application for registration as a registered organization. In order to apply for registration, an applicant must submit a \$10,000 non-refundable application fee along with an additional \$200,000 refundable registration fee. The \$10,000 non-refundable application fee will cover the cost to the department in reviewing the application. The additional \$200,000 registration fee will be refunded to those applicants not selected as registered organizations. For those applicants selected as registered organizations, the \$200,000 registration fee will cover all of the registered organization's manufacturing and dispensing facilities for a period of two-years.

Applicants selected as registered organizations will have ongoing costs related to reporting and response to issues regarding oversight. In addition, registered organizations will have costs associated with requirements for testing of medical marijuana products by approved independent laboratories. These costs are necessary to ensure that the approved medical marijuana product made available to certified patients is safe and reliable.

The proposed regulations set forth manufacturing and dispensing requirements for the registered organizations. There will be costs associated with the manufacture, laboratory testing, packaging, labeling and distribution of the product to dispensing facilities. Costs will also be associated with the reporting requirements of the registered organization, security of the facilities, and labor.

Certified Patients and designated caregivers will incur costs in the form of a fifty dollar fee for a registry identification card, which may be reduced

or waived in the case of financial hardship, and the cost of purchasing the dispensed approved medical marijuana product.

Costs to State and Local Government:

The proposed rules do not require the state or local government to perform any additional tasks.

Costs to the Department of Health:

The review of practitioner registration, patient certification, registration identification card and registered organization applications will require the commitment of department staff resources. The Department of Health also anticipates an increased administrative cost to support the ongoing monitoring and compliance of the medical marijuana program, and for laboratory services provided by the Wadsworth Center for quality assurance testing of medical marijuana products and for any ongoing testing required to investigate serious adverse events.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities on local government.

Paperwork:

The paperwork associated with processing applications for entities who wish to become registered organizations in New York State will include, but are not limited to, detailed architectural plans, standard operating procedures, and security procedures. The process to certify patients and provide registry identification cards will require minimal paperwork as the process will be automated to the fullest extent possible.

Duplication:

The proposed regulations do not duplicate any existing State or federal requirements.

Alternatives:

There are no alternatives to the adoption of regulations to be considered during the regulatory process since regulations are required by Title V-A of Article 33 of the Public Health Law.

Federal Standards:

Federal requirements do not include provisions for a medical marijuana program.

Compliance Schedule:

The proposed regulations will take effect upon publication of a Notice of Adoption in the New York State Register.

#### Regulatory Flexibility Analysis

Effect of Rule:

This proposed rule will allow registered organizations to manufacture, distribute and sell approved medical marijuana products in New York State. Each registered organization may have up to four dispensaries, geographically dispersed. There are no costs to existing small business establishments or government entities in New York State.

Compliance Requirements:

There are no new compliance requirements imposed to existing small business establishments as a result of these amendments.

Professional Services:

No new professional services will be required of small business entities and local governments.

Compliance Costs:

Since there are no small business entities which currently provide for the manufacture, distribution and dispensing of medical marijuana, the proposed regulations do not impose an economic impact on any existing small business entity. Entities who wish to become licensed as a registered organization will incur costs associated with the building and operation of facilities to manufacture, distribute and dispense the approved medical marijuana product. Laboratory testing of the final product, which will also incur a cost to the registered organization, will be required. The manufacture of the plant into approved dosage forms and product testing are required to minimize the risk of adverse events to patients from mislabeled products or products containing contaminants.

Economic and Technological Feasibility:

This proposal is economically and technologically feasible. Statute requires the registered organization to pay a 7% excise tax to the Commissioner of Tax and Finance. This tax will provide for a return of 22.5% to the counties in New York State where medical marijuana is manufactured, 22.5% to the counties in New York State in which the medical marijuana is dispensed, 5% to the Division of Criminal Justice Services and 5% to the Office of Alcoholism and Substance Abuse Services.

Minimizing Adverse Impact:

These regulations will allow for the manufacture, distribution and sale of medical marijuana to patients suffering from a severe debilitating or life-threatening condition. To minimize the potential for patient adverse effects associated with the use of medical marijuana, the regulations provide for a limited number of approved brands (cannabinoid profiles) and dosage forms that registered organizations may manufacture. In addition, the regulations require laboratory testing of the final manufactured product by a laboratory certified by New York State and located in New York State. These requirements do not create an adverse impact to small business and local governments.

**Small Business and Local Government Participation:**

The Department consulted with other state agencies, including the Department of Environmental Conservation, the Department of Agriculture and Markets, the Division of New York State Police, the Division of Criminal Justice Services, the Empire State Development Corporation, the Department of Taxation and Finance and the Office for Alcoholism and Substance Abuse Services. The Department also discussed the statute and received input from various advocacy organizations. These organizations and advocates spoke on behalf of patients and their families, physicians, addiction treatment specialists, and potential employees of registered organizations. The Department also solicited feedback from interested parties through a web form on the Medical Marihuana Program website. There will be a 45-day public comment period with the regulations that will allow for additional comments to be considered.

**Rural Area Flexibility Analysis****Types and Estimated Numbers of Rural Areas:**

Outside of major cities and metropolitan population centers, the majority of counties in New York State contain rural areas. Entities who wish to become a registered organization may have up to four dispensaries, geographically dispersed. The selection of the five registered organizations will take into account geographic distribution to ensure the needs of patients in rural areas are met. Due to the limited number of dispensing facilities that will operate in New York State, the ability for a patient to designate a caregiver was included in the regulations to increase accessibility to patients in rural areas.

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:**

There are no new reporting, recordkeeping or other compliance requirements imposed on rural areas as a result of these amendments. No new professional services will be required of rural areas. Compliance requirements will be limited to the entities who become licensed as a registered organization.

**Costs:**

There are no compliance costs to existing establishments in rural areas since no new compliance activities are imposed upon them. Compliance costs will be limited to the entities who become licensed as a registered organization.

**Minimizing Adverse Impact:**

The proposed rule will apply to practitioners who wish to complete the educational requirement in order to issue certifications to patients for medical marihuana. Practitioners in rural areas of the state may complete this course, which will be offered online to make the course easily accessible to all practitioners who wish to issue certifications to patients for approved medical marihuana products. Due to the limited number of dispensing facilities that will operate in New York State, designated caregivers are authorized to obtain approved medical marihuana products from dispensing facilities to increase accessibility to patients in rural areas.

**Rural Area Participation:**

The Department consulted with other state agencies, including Department of Environmental Conservation, Department of Agriculture and Markets, Division of New York State Police, Division of Criminal Justice Services, Empire State Development Corporation, Department of Taxation and Finance, and the Office of Alcoholism and Substance Abuse Services. The Department also solicited feedback from interested parties through a web form on the Medical Marihuana Program website. There will be a 45-day public comment period with the regulations that will allow for additional comments to be considered regarding rural areas.

**Job Impact Statement**

A Job Impact Statement is not included because the Department has concluded that the proposed regulatory amendments will not have a substantial adverse effect on jobs and employment opportunities. The proposed amendments will allow for the opposite effect on jobs as new jobs will be created to support the activities of registered organizations.

**Proposed Action:** This is a consensus rule making to repeal section 2101.5 of Title 8 NYCRR. This rule is proposed pursuant to [SAPA § 207(3)], 5-Year Review of Existing Rules.

**Statutory authority:** Education Law, sections 653, 655, 680(2); and 20 USC section 1078(b)(1)(H)(i)

**Subject:** Default fee.

**Purpose:** To repeal section 2101.5 of Title 8 of the NYCRR as obsolete.

**Text of proposed rule:** Repeal of section 2101.5 of Title 8 of the NYCRR.

**Text of proposed rule and any required statements and analyses may be obtained from:** Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1325, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Consensus Rule Making Determination**

This statement is being submitted pursuant to subparagraph (i) of paragraph (b) of subdivision (1) of section 202 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (HESC) Notice of Proposed Rule Making seeking to repeal section 2101.5 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

It is apparent from the nature and purpose of this rule that no person is likely to object to the adoption of the rule as written. Section 2101.5 provides that the default fee charged by the corporation for Federal Family Education Loan Program (FFELP) loans shall be no more than what is prescribed by the Higher Education Act of 1965, as amended. The default fee is assessed upon origination of the FFELP loan. Pursuant to federal law, the origination of FFELP loans ceased as of July 1, 2010. As a result, this section of HESC's regulations is no longer needed.

Consistent with the definition of "consensus rule", as set forth in section 102(11) of the State Administrative Procedure Act, HESC has determined that this proposal, which repeals an obsolete rule, is non-controversial and, therefore, no person is likely to object to its adoption.

**Reasoned Justification for Modification of the Rule**

This statement is being submitted pursuant to subdivision (3) of section 207 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (HESC) Notice of Proposed Rule Making seeking to repeal section 2101.5 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

Section 2101.5 provides that the default fee charged by the corporation for Federal Family Education Loan Program (FFELP) loans shall be no more than what is prescribed by the Higher Education Act of 1965, as amended. The default fee is assessed upon origination of the FFELP loan. Pursuant to federal law, the origination of FFELP loans ceased as of July 1, 2010. As a result, this section of HESC's regulations is no longer needed justifying its repeal.

**Job Impact Statement**

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (Corporation) Notice of Proposed Rulemaking seeking to repeal section 2101.5 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it has no impact on jobs and employment opportunities. The rule repeals an obsolete section of HESC's regulations as a result of the cessation of loan originations under the Federal Family Education Loan Program.

The Corporation has determined that this rule will have no substantial adverse impact on any private or public sector jobs or employment opportunities and therefore a full Job Impact Statement is not necessary.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**New York State Math and Science Teaching Incentive Program**

**I.D. No.** ESC-52-14-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** This is a consensus rule making to amend section 2201.10 of Title 8 NYCRR. This rule is proposed pursuant to [SAPA § 207(3)], 5-Year Review of Existing Rules.

**Statutory authority:** Education Law, sections 653, 655 and 669-d

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## Higher Education Services Corporation

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**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Default Fee**

**I.D. No.** ESC-52-14-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Subject:** New York State Math and Science Teaching Incentive Program.

**Purpose:** To delete an outdated and incorrect reference.

**Text of proposed rule:** Paragraph (2) of subdivision (f) of section 2201.10 is amended to read as follows:

(2) Interest for the life of the loan shall be fixed and equal to that published annually by the U.S. Department of Education for [FFELP] Federal Direct Loan Program PLUS parent loans pursuant to the terms of the service contract.

**Text of proposed rule and any required statements and analyses may be obtained from:** Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1325, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Consensus Rule Making Determination**

This statement is being submitted pursuant to subparagraph (i) of paragraph (b) of subdivision (1) of section 202 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation’s (HESC) Notice of Proposed Rule Making seeking to amend section 2201.10 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

It is apparent from the nature and purpose of this rule that no person is likely to object to the adoption of the rule as written. Section 2201.10 provides that in converting an award to a loan, the interest shall be equivalent to the rate published annually by the U.S. Department of Education for Federal Family Education Loan Program (FFELP) PLUS parent loans. Pursuant to federal law, the origination of FFELP loans ceased as of July 1, 2010. As a result, the reference to FFELP loans is outdated. This rule corrects the reference to reflect use of Federal Direct Loan Program PLUS parent loan interest rates.

Consistent with the definition of “consensus rule”, as set forth in section 102(11) of the State Administrative Procedure Act, HESC has determined that this proposal, which deletes an outdated and incorrect reference, is non-controversial and, therefore, no person is likely to object to its adoption.

**Reasoned Justification for Modification of the Rule**

This statement is being submitted pursuant to subdivision (3) of section 207 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation’s (HESC) Notice of Proposed Rule Making seeking to amend section 2201.10 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

Section 2201.10 provides that in converting an award to a loan, the interest shall be equivalent to the rate published annually by the U.S. Department of Education for Federal Family Education Loan Program (FFELP) PLUS parent loans. Pursuant to federal law, the origination of FFELP loans ceased as of July 1, 2010. As a result, the reference to FFELP loans is outdated and must instead reference Federal Direct Loan Program loans. This rule corrects the incorrect reference.

**Job Impact Statement**

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation’s (Corporation) Notice of Proposed Rulemaking seeking to amend section 2201.10 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it has no impact on jobs and employment opportunities. This rule deletes an outdated and incorrect reference to Federal Family Education Loan Program (FFELP) PLUS parent loans, which are no longer originated and instead references Federal Direct Loan Program PLUS parent loans.

The Corporation has determined that this rule will have no substantial adverse impact on any private or public sector jobs or employment opportunities and therefore a full Job Impact Statement is not necessary.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Volunteer Recruitment Service Scholarships Program**

**I.D. No.** ESC-52-14-00018-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** This is a consensus rule making to repeal section 2201.11 of Title 8 NYCRR. This rule is proposed pursuant to [SAPA § 207(3)], 5-Year Review of Existing Rules.

**Statutory authority:** Education Law, sections 653, 655 and 669-c

**Subject:** Volunteer Recruitment Service Scholarships Program.

**Purpose:** To repeal section 2201.11 of Title 8 of the NYCRR as obsolete.

**Text of proposed rule:** Repeal of section 2201.11 of Title 8 of the NYCRR.

**Text of proposed rule and any required statements and analyses may be obtained from:** Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1325, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Consensus Rule Making Determination**

This statement is being submitted pursuant to subparagraph (i) of paragraph (b) of subdivision (1) of section 202 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation’s (HESC) Notice of Proposed Rule Making seeking to repeal section 2201.11 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

It is apparent from the nature and purpose of this rule that no person is likely to object to the adoption of the rule as written. The Volunteer Recruitment Service Scholarships program expired and was deemed repealed on June 30, 2010. Since there are no outstanding requirements to be fulfilled and no new awards will be made, the regulation implementing this program is no longer needed.

Consistent with the definition of “consensus rule”, as set forth in section 102(11) of the State Administrative Procedure Act, HESC has determined that this proposal, which repeals an obsolete rule, is non-controversial and, therefore, no person is likely to object to its adoption.

**Reasoned Justification for Modification of the Rule**

This statement is being submitted pursuant to subdivision (3) of section 207 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation’s (HESC) Notice of Proposed Rule Making seeking to repeal section 2201.11 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

The Volunteer Recruitment Service Scholarships program expired and was deemed repealed on June 30, 2010. Since there are no outstanding requirements to be fulfilled and no new awards will be made, the regulation implementing this program is no longer needed justifying its repeal.

**Job Impact Statement**

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation’s (Corporation) Notice of Proposed Rulemaking seeking to repeal section 2201.11 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it has no impact on jobs and employment opportunities. This rule repeals an obsolete section of HESC’s regulations implementing the Volunteer Recruitment Service Scholarships program, which expired and was deemed repealed on June 30, 2010.

The Corporation has determined that this rule will have no substantial adverse impact on any private or public sector jobs or employment opportunities and therefore a full Job Impact Statement is not necessary.

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**Office of Mental Health**

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**EMERGENCY  
RULE MAKING**

**Implementation of the Protection of People with Special Needs Act and Reforms to Incident Management**

**I.D. No.** OMH-52-14-00002-E

**Filing No.** 1015

**Filing Date:** 2014-12-11

**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Parts 501 and 550; repeal of Part 524; and addition of new Part 524 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.07, 7.09 and 31.04

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012, the Governor signed the Protection of People with Special Needs Act (PPSNA). This new law created the Justice Center for the Protection of People with Special Needs (Justice Center) and established many new protections for vulnerable persons, including a new system for incident management in services operated or licensed by OMH and new requirements for more comprehensive and coordinated pre-employment background checks.

The amendment of OMH regulations is necessary to implement many of the provisions contained in the PPSNA.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals with mental illness who receive services in the OMH system. If OMH did not promulgate regulations on an emergency basis, many of the protections established by the PPSNA vital to the health, safety and welfare of individuals with mental illness would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from inconsistent requirements. For example, the emergency regulations change the categories of incidents to conform to the categories established by the PPSNA. Without the promulgation of these amendments, agencies would be required to report incidents based on one set of definitions to the Justice Center and incidents based on a different set of definitions to OMH. Requirements for the management of incidents would also be inconsistent. Especially concerning regulatory requirements related to incident management and pre-employment background checks, it is crucial that OMH regulations be changed to support the new requirements in the PPSNA so that this initiative is implemented in a coordinated fashion.

For all of the reasons outlined above, this rule is being adopted on an Emergency basis until such time as it has been formally adopted through the SAPA rule promulgation process.

**Subject:** Implementation of the Protection of People with Special Needs Act and reforms to incident management.

**Purpose:** To enhance protections for people with mental illness served in the OMH system.

**Substance of emergency rule:** The emergency regulations are intended to conform regulations of the Office of Mental Health (OMH) to Chapter 501 of the Laws of 2012 (Protection of People with Special Needs Act or PPSNA). The primary changes include:

- 14 NYCRR Part 501 is amended by adding a new Subdivision (a) to Section 501.5, "Obsolete or Outdated References," that replaces any reference throughout OMH regulations to the Commission on Quality of Care and Advocacy for Persons with Disabilities with a reference to the Justice Center for the Protection of People with Special Needs.

- 14 NYCRR Part 524 (Incident Management) has been repealed and revised to incorporate categories of "reportable incidents" as established by the PPSNA and includes enhanced provisions regarding incident investigations. The amendments make changes related to definitions, reporting, investigation, notification and committee review of events and situations that occur in providers of mental health services licensed or operated by OMH. It is OMH's expectation that implementation of these amendments will enhance safeguards for persons with mental illness, which, in turn, will allow individuals to focus on their recovery. The amendments also require distribution of the Code of Conduct, developed by the Justice Center, to all employees. Providers must maintain signed documentation from such employees, indicating that they have received, and understand, the Code.

- Revisions to 14 NYCRR Part 550 are intended to facilitate and implement the consolidation of the criminal background check function in the Justice Center, and to make other conforming changes to the criminal background check function established by the PPSNA.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 10, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

#### **Regulatory Impact Statement**

1. Statutory Authority: Chapter 501 of the Laws of 2012, i.e., "The Protection of People with Special Needs Act," establishes Article 20 of the Executive Law, Article 11 of the Social Services Law, and makes a number of amendments in other statutes, including the Mental Hygiene Law.

Section 7.07 of the Mental Hygiene Law, charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, that such care, treatment, and rehabilitation are of high quality and effectiveness, and that the personal and civil rights of persons with mental illness receiving care and treatment are adequately protected.

Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

2. Legislative Objectives: These regulatory amendments further the legislative objectives embodied in the Protection of People with Special Needs Act, as well as Sections 7.07, 7.09, and 31.04 of the Mental Hygiene Law. The amendments incorporate a number of reforms to regulations of the Office of Mental Health (OMH) in order to increase protections and improve the quality of services provided to persons receiving services from mental health providers operated or licensed by OMH.

3. Needs and Benefits: The amendments include new and modified requirements for incident management programs, codified at 14 NYCRR Part 524, and also add and revise provisions of Parts 501 and 550 to implement Chapter 501 of the Laws of 2012. Known as "The Protection of People with Special Needs Act," this new law requires the establishment of comprehensive protections for vulnerable persons, including persons with mental illness, against abuse, neglect and other harmful conduct.

The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems. The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. In collaboration with OMH, the Justice Center is also charged with developing and delivering appropriate training for caregivers, their supervisors and investigators. Additionally, the Justice Center is responsible for conducting criminal background checks for applicants, including those who will be working in the OMH system.

Chapter 501 of the Laws of 2012 also created a Vulnerable Persons' Central Register (VPCR). This register contains the names of custodians found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All custodians found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Custodians having committed egregious or repeated acts of abuse or neglect are prohibited from future employment in providing services for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Job applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

Pursuant to Chapter 501 of the Laws of 2012, the Justice Center is charged with recommending policies and procedures to OMH for the protection of persons with mental illness. This effort involves the development of requirements and guidelines in areas including but not limited to incident management, rights of people receiving services, criminal background checks, and training of custodians. In accordance with Chapter 501, these requirements and guidelines must be reflected, wherever appropriate, in OMH's regulations. Consequently, the amendments incorporate the requirements in regulations and guidelines recently developed by the Justice Center.

The amendments make changes to OMH's incident management process to strengthen the process and to provide further protection to people receiving services from harm and abuse. For example, the amendments make changes related to definitions, reporting, investigation, notification, and committee review of events and situations that occur in providers of mental health services licensed or operated by OMH. It is OMH's expectation that implementation of the amendments will enhance safeguards for persons with mental illness, which will in turn allow individuals to focus on their recovery.

#### 4. Costs:

(a) Costs to the Agency and to the State and its local governments: OMH will not incur significant additional costs as a provider of services. While the regulations impose some new requirements on providers, OMH expects that it will comply with the new requirements with no additional staff. There may be minimal one-time costs associated with notification and training of staff.

Chapter 501 created the Justice Center, which assumes some designated functions previously performed by OMH. The Justice Center manages the criminal background check process and conducts some investigations that had previously been conducted by OMH. OMH experienced savings associated with the reduction in staff performing these functions; however, because the staff shifted to the Justice Center, the net effect is cost neutral.

There may be some minor costs associated with necessary modifications to NIMRS (the New York Incident Management Reporting System developed by OMH) to reflect Justice Center requirements.

Any costs or savings will have no impact on Medicaid rates, prices or fees. Therefore, there is no impact on New York State in its role paying for Medicaid services.

There are no costs to local governments as there are no changes to Medicaid reimbursement.

(b) Costs to private regulated parties: It is difficult to estimate the cost impact on private regulated parties; however, OMH expects that costs to providers will be minimal. OMH already requires the reporting and investigation of incidents. The implementation of these reforms in general will not result in costs. There may also be additional costs associated with the need for medical examinations in cases of alleged physical abuse or clinical assessments needed to substantiate a finding of psychological abuse. Again, OMH is not able to estimate these cost impacts. There are no costs associated with a check of the Staff Exclusion List. Other amendments made in the rule making merely clarify existing requirements or interpretive guidance, or can be implemented without cost to the provider.

OMH anticipates that generally any potential costs incurred will be mitigated by savings that the provider will realize from the improvements to the incident management process. OMH expects that in the long term, the amendments will ultimately reduce incidents and abuse in its system and increase efficiency and quality in the reporting, investigation, notification, and review of such events. OMH is not able to quantify the minor potential costs or the savings that might be realized by the promulgation of these amendments.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The new regulations require additional paperwork to be completed by providers. Examples of additional paperwork are found in new requirements pertaining to reporting reportable incidents to the Justice Center and making additional notifications. However, the Justice Center will likely predominantly utilize electronic format for incident reporting.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with mental illness. In some instances, the regulations reiterate current requirements in New York State law.

8. Alternatives: Current definitions of incidents in OMH regulations that require reporting and investigation exceed the criteria in the new statutory definitions in Chapter 501. OMH considered reducing or eliminating requirements applying to events and situations that do not meet the criteria in the statutory definitions for "reportable incidents." However, OMH chose to propose the continuation of protections associated with these events and situations.

9. Federal Standards: The amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The regulations will be effective immediately upon filing to ensure compliance with Chapter 501 of the Laws of 2012. OMH intends thereafter to continue to develop and transmit implementation guidance to regulated parties to assist them with compliance.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: OMH has determined, through its Bureau of Inspection and Certification, that approximately 732 agencies provide services which are certified or licensed by OMH. OMH is unable to estimate the portion of these providers that may be considered to be small businesses (under 100 employees).

However, the amendments have been reviewed by OMH in light of their impact on small businesses. The regulations make revisions to OMH's requirements for incident management which will necessitate some changes in compliance activities and may result in additional costs and savings to providers, including small business providers. However, OMH is unable to quantify the potential additional costs and savings to providers as a result of these amendments. In any event, these changes are required by statute and OMH considers that the improvements in protections for people served in the OMH system will help safeguard individuals from harm and abuse; thus, the benefits more than outweigh any potential negative impact on providers.

2. Compliance requirements: The regulations add several new requirements with which providers must comply. Amendments associated with the implementation of Chapter 501 include a requirement that providers report "reportable incidents" and deaths to the Justice Center. In addition, the regulations impose an obligation on providers to obtain an examination for physical injuries; however, OMH anticipates that providers are already obtaining examinations of physical injuries. While Chapter 501 also establishes an obligation to obtain a clinical assessment to substantiate a charge of psychological abuse, it is not immediately clear who will be responsible for obtaining, and paying for, that assessment.

Current OMH regulations require reporting and investigation of incidents, and that providers request criminal background checks. While the amendments incorporate some changes and reforms, the basic requirements are conceptually unchanged. OMH, therefore, expects that additional compliance activities (except as noted above) will be minimal. There is no associated cost with checking the Staff Exclusion List. The cost to check the Statewide Register of Child Abuse and Maltreatment is \$25 per check; providers serving children are already incurring this cost. However, this would represent a new cost for providers who previously did not request such checks, though this cost could be passed by the provider to the applicant.

Providers subject to these regulations are already responsible for complying with incident management regulations. The regulations enhance some of these requirements, e.g., providers must comply with the new requirement to complete investigations within a 45-day timeframe. Providers must also comply with new requirements to enhance the independence of investigators and incident review committees. However, OMH expects that additional compliance activities associated with these enhanced requirements will be minimal.

3. Professional services: There may be additional professional services required for small business providers as a result of these amendments. The definition of psychological abuse references a need to determine specific impacts on an individual receiving services by means of a clinical assessment, but it is not immediately clear at what stage in the process that assessment must be maintained or who is responsible for obtaining and paying for it. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There may be modest costs for small business providers associated with these amendments. There may be nominal costs for providers to comply with the expanded notification requirements, but OMH is unable to determine the cost impact. Furthermore, providers may experience savings if the Justice Center or OMH assumes responsibility for investigations that were previously conducted by provider staff. In the long term, compliance activities associated with the implementation of these amendments are expected to reduce future incidents and abuse, resulting in savings for providers as well as benefits to the wellbeing of individuals receiving services.

5. Economic and technological feasibility: The amendments may impose the use of new technological processes on small business providers. Providers have already been reporting incidents and abuse in NIMRS, and that technology will continue to be used. However, statutory requirements to report reportable incidents to the Justice Center in the manner specified by the Justice Center may impose new technology requirements if that is the manner specified by the Justice Center. However, this is not a direct impact caused by the regulations.

6. Minimizing adverse impact: The amendments may result in an adverse economic impact for small business providers due to additional compliance activities and associated compliance costs. However, as stated earlier, OMH expects that compliance with these new regulations will result in savings in the long term and there may be some short term savings as a result of the conduct of investigations by the Justice Center.

OMH has reviewed the regulations to determine if there were any viable approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act; none were readily identified. However, OMH did not consider the exemption of small businesses from these amendments or the establishment of differing compliance or reporting requirements since OMH considers compliance with the amendments to be crucial for the health, safety, and welfare of the individuals served by small business providers.

7. Small business participation: Chapter 501 of the Laws of 2012 was originally a Governor's Program Bill which received extensive media attention. Providers have had the opportunity to become familiar with its provisions since it was made available on various government websites last June. Furthermore, in accordance with statutory requirements, the rule was presented to the Mental Health Services Council for review and recommendations.

8. The amendments include a penalty for violating the regulations of a fine not to exceed \$1,000 per day or \$15,000 per violation in accordance with section 31.16 of the Mental Hygiene Law and/or may suspend, revoke, or limit an operating certificate or take any other appropriate action, in accordance with applicable law and regulations. However, due process is available to a provider via 14 NYCRR Part 503.

#### **Rural Area Flexibility Analysis**

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OMH services are provided in every county in New York State. Forty-three counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam,

Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The amendments have been reviewed by OMH in light of their impact on rural areas. The regulations make revisions and in some cases enhance OMH's current requirements for incident management programs, which will necessitate some changes in compliance activities and result in additional costs and savings to providers, including those in rural areas. However, OMH is unable to quantify the potential additional costs and savings to providers as a result of these amendments. In any event, OMH considers that the improvements in protections for people served in the OMH system will help safeguard individuals from harm and abuse and that the benefits more than outweigh any potential negative impacts on all providers.

The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Compliance requirements: The regulations add some new requirements with which providers must comply. Amendments associated with the implementation of Chapter 501 include a requirement that providers report "reportable incidents" and deaths to the Justice Center. In addition, the regulations impose an obligation on providers to obtain an examination for physical injuries, and there is a requirement that, for a finding of psychological abuse to be substantiated, a clinical assessment is needed in order to demonstrate the impact of the conduct on the individual receiving services.

Current OMH regulations require reporting and investigation of incidents, and that providers request criminal background checks. While the amendments incorporate some changes, the basic requirements are conceptually unchanged. OMH therefore expects that additional compliance activities associated with these changes will be minimal. However, there will be additional compliance activities associated with checking the Staff Exclusion List.

Providers must comply with the new requirement to complete investigations within a 45-day timeframe. Providers must also comply with new requirements to enhance the independence of investigators and incident review committees. However, OMH expects that additional compliance activities will be minimal since providers are already required to comply with existing incident management program requirements; these revisions primarily enhance current requirements.

3. Professional services: There may be additional professional services required for rural providers as a result of these amendments. The amendments will not add to the professional service needs of rural providers.

4. Compliance costs: There may be modest costs for rural providers associated with the amendments. There also may be nominal costs for rural providers to comply with the expanded notification requirements. However, all providers may experience savings if the Justice Center or OMH assumes responsibility for investigations that were previously conducted by provider staff.

In the long term, compliance activities associated with the implementation of these amendments are expected to reduce future incidents and abuse, resulting in savings for both urban and rural area providers as well as benefits to the wellbeing of individuals receiving services.

5. Minimizing adverse impact: The amendments may result in an adverse economic impact for rural providers due to additional compliance activities and associated compliance costs. However, as stated earlier, OMH expects that compliance with these enhanced regulations will result in savings in the long term and there may be some short-term savings as a result of the conduct of investigations by the Justice Center.

OMH has reviewed the regulations to determine if there were any viable approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act; none were readily identified. However, OMH did not consider the exemption of rural area providers from the amendments or the establishment of differing compliance or reporting requirements, since OMH considers compliance with the amendments to be crucial for the health, safety, and welfare of the individuals served by rural area providers.

6. Participation of public and private interests in rural areas: Chapter 501 of the Laws of 2012 was originally a Governor's Program Bill which received extensive media attention. Providers have had the opportunity to become familiar with its provisions since it was made available on various government websites last June. Furthermore, in accordance with statutory requirements, the rule was presented to the Mental Health Services Council for review and recommendations.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because OMH does not anticipate a substantial adverse impact on jobs and employment opportunities.

The amendments incorporate a number of reforms to improve the quality and consistency of incident management activities throughout the OMH system. However, it is not anticipated that these reforms will negatively impact jobs or employment opportunities. The amendments that impose new requirements on providers, such as additional reporting requirements and the timeframe for completion of investigations, will not result in an adverse impact on jobs. OMH anticipates that there will be no effect on jobs as agencies will utilize current staff to perform the required compliance activities.

Chapter 501 of the Laws of 2012 and these implementing regulations will also mean that some functions that are currently performed by OMH staff will instead be performed by the staff of the Justice Center. OMH expects that the volume of incidents and occurrences investigated will be roughly similar. To the extent that the Justice Center performs investigations, oversees the management of reportable incidents, and manages requests for criminal history record checks, the result is expected to be neutral in that positions lost by OMH will be gained by the Justice Center.

It is therefore apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

## **NOTICE OF ADOPTION**

### **Integrated Outpatient Services**

**I.D. No.** OMH-41-14-00017-A

**Filing No.** 1062

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Subpart 599-1 to Title 14 NYCRR.

**Statutory authority:** Social Services Law, sections 364, 364-a, 365-a(2)(c) and 365-1(7); L. 2012, ch. 56, part L; Mental Hygiene Law, sections 7.09, 7.15, 31.04, 31.07, 31.09, 31.11, 31.13 and 31.19

**Subject:** Integrated Outpatient Services.

**Purpose:** Promote increased access to physical and behavioral health services at a single site and foster delivery of integrated services.

**Substance of final rule:** The regulation relates to standards applicable to programs licensed or certified by the Department of Health (DOH; Public Health Law Article 28), Office of Mental Health (OMH; Mental Hygiene Law Articles 31 and 33) or Office of Alcoholism and Substance Abuse Services (OASAS; Mental Hygiene Law Articles 19 and 32) which desire to add to existing programs services provided under the licensure or certification of one or both of the other agencies. OMH has made minor, technical changes to the final adopted regulation. The changes to the applicable sections are listed below.

§ 599-1.1 Background and Intent. This section speaks to the background and intent of the Proposed Rule as applicable to all three agencies (DOH, OMH, and OASAS). The purpose of the Rule is to promote increased access to physical and behavioral health services at a single site and to foster the delivery of integrated services based on recognition that behavioral and physical health are not distinct conditions. One change was made to this section to fix a grammatical error.

§ 599-1.2 Legal Base. This section provides the Legal Base applicable to all three agencies for the promulgation of this Proposed Rule. Two minor changes were made to this section that were grammatical in nature and serve to provide consistency with DOH's rule.

§ 599-1.3 Applicability. This section identifies providers of outpatient services or programs to which the standards outlined in the Proposed Rule would apply (e.g., providers certified or licensed, or in the process of pursuing licensure or certification, by at least two of the participating state agencies). Such providers would continue to maintain regulatory standards applicable to the host program's license or certification. Minor changes were made to this section to correct two inaccurate citations and improve readability.

§ 599-1.4 Definitions. This section provides definitions as used in the Proposed Rule which would be applicable to any program licensed or certified by any of the three participating state agencies and identified as the host (program requesting the addition of services). Definitions specific to a host program's licensing agency are found in regulations of that agency. Among other things, the section defines an "integrated services provider" as a provider holding multiple operating certificates or licenses to provide outpatient services, who has also been authorized by a Commissioner of a state licensing agency to deliver identified integrated care services at a specific site in accordance with the provisions of this Part. One change was made to the final version to clarify the definition of "primary care services."

§ 599-1.5 Integrated Care Models. This section describes three (3) models for host programs: (a) Primary Care Host Model with compliance monitoring by DOH; (b) Mental Health Behavioral Care Host Model with compliance monitoring by OMH; and (c) Substance Use Disorder Behavioral Care Host Model with compliance monitoring by OASAS. One change was made to the final version that changes the term “chemical dependence” to “substance use disorder.”

§ 599-1.6 Organization and Administration. This section requires any integrated services provider to be certified by the appropriate state agency and to revise any practices, policies and procedures as necessary to ensure regulatory compliance. One grammatical change was made to this section.

§ 599-1.7 Treatment Planning. This section requires treatment planning for any patient receiving behavioral health services (OMH and/or OASAS) from an integrated service provider and articulates the scope, standards and documentation requirements for such treatment plans including requirements of managed care plans where applicable. Minor technical changes were made to this section to improve readability.

§ 599-1.8 Policies and procedures. This section identifies minimum required policies and procedures for any integrated service provider. The term “chemical dependence” was changed to “substance use disorder” in this section.

§ 599-1.9 Integrated Care Services. This section identifies the minimum services required of any integrated services provider providing any of the three care models. The section also identifies services for each model which may be provided at an integrated services provider’s option. One formatting change was made to this section and the terminology was again changed from “chemical dependence” to “substance use.”

§ 599-1.10 Environment. This section outlines minimum physical plant requirements necessary for certifying existing facilities which want to provide integrated care services. The section requires programs seeking certification after the effective date of this Rule or who anticipate new construction or significant renovations to comply with requirements of 10 NYCRR Parts 711 (General Standards of Construction) and 715 (Standards of Construction for Freestanding Ambulatory Care Facilities). An additional Part was added to reference the Approval of Medical Facility Construction, and the term “physical health” was changed to “primary care.”

§ 599-1.11 Quality Assurance, Utilization Review and Incident Reporting. This section outlines the requirements and obligations of an integrated service provider relative to QA/UR and Incident Reporting and are detailed by the type of model as the host program. References to “physical health” have been changed to “primary care” and the term “chemical dependence” has been changed to “substance use disorder.”

§ 599-1.12 Staffing. This section outlines staffing requirements by type of model as the host program and identifies specific requirements which may be unique to the primary care host model such as subspecialty credentials of a medical director. Formatting change was made to improve readability.

§ 599-1.13 Recordkeeping. This section requires that a record be maintained for every individual admitted to and treated by an integrated services provider. Additional requirements include designated recordkeeping staff, record retention, and minimum content fields specific to each model. Confidentiality of records is assured via patient consents and disclosures compliant with state and federal law.

§ 599-1.14 Application and Approval. This section outlines the process whereby a provider seeking to become an integrated service provider may submit an application for review and approval. Applications are standardized for use by all three licensing agencies but shall be reviewed by both the agency that regulates the services to be added and the agency with authority for the host clinic. The section identifies minimum standards for approval.

§ 599-1.15 Inspection. This section requires the state licensing agency with authority to monitor the host clinic to have ongoing inspection responsibility pursuant to standards outlined in this Proposed Rule. The adjunct state licensing agency will not duplicate inspections for license renewal or compliance but shall be consulted about any deficiencies relative to the added services. The section identifies specific areas of review and requires one unannounced inspection prior to renewal of an Operating Certificate or License. Formatting was changed to improve readability.

A copy of the full text of the regulatory proposal is available on the OMH website at:

[http://www.omh.ny.gov/omhweb/policy\\_\\_and\\_\\_regulations/](http://www.omh.ny.gov/omhweb/policy__and__regulations/).

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 599-1.1(b), 599-1.2(c)(1), (10), 599-1.3(a), (b), (e), (f), 599-1.4(j), 599-1.5(c), 599-1.6(a), 599-1.7(a), (c)(1), (2), (e)(8), (f)(4), 599-1.8(c), 599-1.9(b)(2), (c)(4), 599-1.10(a), (c)(2)(i), 599-1.11(a)(1)(i), (2)(i), (b)(2), 599-1.12(b)(2)(iv), (v), (vi) and 599-1.15(d)(2).

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

#### **Revised Regulatory Impact Statement**

Changes made to the published rule do not necessitate revision to the previously published Regulatory Impact Statement (“RIS”) for the regulatory filing to create a new 14 NYCRR Subpart 599 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the RIS.

#### **Revised Regulatory Flexibility Analysis**

Changes made to the published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis for Small Business and Local Governments (“RFASBLG”) for the regulatory filing to create a new 14 NYCRR Subpart 599 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the RFASBLG.

#### **Revised Rural Area Flexibility Analysis**

Changes made to the published rule do not necessitate revision to the previously published Rural Area Flexibility Analysis for Small Business and Local Governments (“RAFA”) for the regulatory filing to create a new 14 NYCRR Subpart 599 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the RAFA.

#### **Revised Job Impact Statement**

Changes made to the published rule do not necessitate revision to the previously published Job Impact Statement (“JIS”) for the regulatory filing to create a new 14 NYCRR Subpart 599 – Integrated Outpatient Services. The revisions to the rule merely clarify the text and correct technical errors (i.e., grammar), which require no change to the JIS.

#### **Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The Office of Alcoholism and Substance Abuse Services (OASAS), Office of Mental Health (OMH) and Department of Health (DOH) received public comments from three provider associations. A fourth set of comments was received from a provider association after the due date. Many of the comments in this late submission were duplicated by other commenters. All comments received were assessed jointly by the three state agencies and are addressed more fully below.

1. Commenters had concerns over not designating a lead agency for the application process and questioning whether a providers wanting to add primary care will need to complete a DOH Certificate of Need (CON) application.

Response: The agencies have developed a web based single application that will be transmitted to all three agencies simultaneously. Providers will be contacted by the involved agencies and may be asked for additional information as necessary. The state licensing agency that originally licensed the site in question will advise the provider of the ultimate determination. There is no separate CON application needed for providers wanting to add primary care.

2. Commenters suggested the regulations are overly restrictive in requiring dual licensure/certification and suggested expanding integrated services to entities that hold only one license/certification, similar to what will be available under Delivery System Reform Incentive Payment (DSRIP) program.

Response: These regulations represent only one model of integrated care, which allows providers who are already licensed or certified by more than one agency to add services at one of their sites without needing to obtain a second license or certification. This allows the agencies to expedite approval and streamline oversight at the site where additional services are added. There are other models of integrated care available to providers, including proceeding under the current allowable thresholds or, for those providers participating in DSRIP, requesting regulatory waivers.

3. A commenter requested that integrated providers, particularly federally qualified health centers (FQHCs), be permitted to be reimbursed for multiple threshold visits per day.

Response: These regulations do not effectuate any change for reimbursement of outpatient services. Integrated providers, including FQHCs that have opted into APGs, can bill using the APG Medicaid reimbursement methodology which permits billing of multiple procedures within a single visit. Generally, integrated providers, including FQHCs are encouraged to bill using the APG reimbursement methodology which enables providers to bill for all the procedures/services rendered on a date of service on a single claim. The Department will undertake consideration of additional mechanisms for billing by FQHCs that do not utilize APGs.

4. A commenter recommended eliminating the requirement for physical separation of space between types of service providers.

Response: Under the regulations (14 NYCRR 825.10(c)(1)(i), 14

NYCRR 599-1.10(c)(1)(i) and 10 NYCRR 404.10(c)(1)(i), examination rooms must be generally available during the hours when primary care services are offered. Such rooms can be used for behavioral health services if not being used for primary care services at that time and if appropriate for the services.

5. A commenter asked whether the boards of integrated providers must include all clinical areas of expertise which they provide.

Response: This is not specifically required by the regulations; however, providers will need to ensure that they are capable of carrying out the requirements that “the established governing bodies of licensed integrated service shall be legally responsible for quality of care and compliance with all applicable laws and regulations.” 14 NYCRR 825.6(b), 14 NYCRR 599-1.6(b) and 10 NYCRR 404.6(b).

6. A commenter requested clarification of the requirement that treatment plans identify each diagnosis for which a patient is being treated.

Response: Treatment plans may be integrated. To the extent they are, all diagnoses for which a patient is being treated should be included in the plan. The agencies are developing a guidance document which will provide additional instructions in treatment plan development.

7. A commenter noted that while the proposed regulations require that periodic reviews of treatment plans include “an evaluation of physical health status” the reviews also should include adjustments to address physical health needs.

Response: 14 NYCRR 825.7(g)(3), 14 NYCRR 599-1.7(g)(3) and 10 NYCRR 404.7(g)(3) apply to treatment plan reviews. By definition a review would include any necessary adjustments to the plan including those required to address shifting physical health needs. No change will be made.

8. Commenters requested clarification of how many professionals are required to sign a treatment plan under 14 NYCRR 825.7(g)(4), 14 NYCRR 599-1.7(g)(4) and 10 NYCRR 404.7(g)(4). Requiring multiple professionals to sign a treatment plan would be burdensome.

Response: Only one responsible staff member involved in the patient’s care needs to sign the treatment plan. The regulations have been clarified.

9. Commenters asked why primary care excludes OB/GYN services.

Response: The regulations (14 NYCRR 825.9(a)(2)(iv), 14 NYCRR 599-1.9(a)(2)(v) and 10 NYCRR 404.9(a)(2)(v)) provide that for behavioral health care models primary care services provided within the specialty of OB/GYN are limited to routine gynecologic care and family planning provided pursuant to 10 NYCRR Part 753. Other OB/GYN services are considered specialty care beyond the scope of what should be offered in these settings.

10. A commenter asked why there are different criteria for how a provider will be determined to be “in good standing” based on the licensing agency.

Response: The regulations set forth a process for expediting approval of the addition of services at a site in lieu of licensure or certification by a second agency; therefore, the provider needs to be in good standing according to the standards of each agency by which it is licensed or certified. All providers will be evaluated using the same criteria after they have been approved to deliver integrated services.

11. A commenter asked why the regulations require integrated providers to be members of a Health Home if being a member of a DSRIP performing provider system (PPS) would be sufficient.

Response: The enabling legislation derives from Health Home legislation and therefore Health Home affiliation is required. The objective of the integrated services initiative are consistent with the objective of the health homes program. Membership in a DSRIP PPS alone is not sufficient.

12. A commenter asked if unannounced inspections occur prior to approval for joint licensure or only prior to renewal?

Response: The inspections contemplated by 14 NYCRR 825.15, 14 NYCRR 599-1.15 and 10 NYCRR 404.15 will occur after approval.

13. A commenter raised a concern about the ability of “busy clinical staff” to meet with agency inspectors and provide requested clinical records.

Response: A key benefit to the integrated licensure regulations is that clinics providing services of multiple State agencies will only be subject to an inspection by one (“host”) State agency, rather than an inspection by each agency. The agencies are mindful of staff time and resources; however to ensure compliance and continued authorization for delivery of integrated services routine inspections are necessary.

14. A commenter asked if fiscal viability reviews will be based on the viability of the integrated services or the entire organization and asked if this requirement could be eliminated.

Response: The requirement is necessary to examine how the operation of an integrated services program will impact the overall fiscal integrity of the provider.

15. A commenter stated that there is duplication and inconsistency between the integrated services regulation and existing regulations for clin-

ics or diagnostic and treatment centers and recommended that 14 NYCRR 825.3(c), 14 NYCRR 599-1.3(c) and 10 NYCRR 404.3(c) be eliminated.

Response: These sections cannot be eliminated because they provide the basis for integrated service providers operating pursuant to the standards of the state agency that initially licensed or certified the provider at the site at which services will be added. The guidance document will provide clarification to the extent any specific inconsistencies are identified.

16. A commenter requested that the definition of primary care services be changed to include “any qualified practitioner working within their defined scope of practice.” Another commenter recommended that the definition of primary care services be expanded to include other professionals.

Response: The regulations were designed to allow providers to add primary care services in certain settings where behavioral health care services are offered. The requested clarification could allow the inclusion of specialty care, which is not appropriate for these settings.

17. Commenters expressed concern that the regulations would restrict providers who do not apply to become an integrated services provider from marketing themselves as delivering integrated services.

Response: These regulations are intended to facilitate one model of delivering integrated care. There is no prohibition on other models that exist or may exist so long as otherwise allowable. 14 NYCRR 825.6(a), 14 NYCRR 599-1.6(a) and 10 NYCRR 404.6(a) have been clarified to reflect this by removing the word “only.”

18. Commenters expressed concerns about the potential conflict between the treatment planning requirements in the regulation and those of Medicaid managed care companies.

Response: The regulations were designed to allow providers to comply with the requirements of Medicaid managed care plans, therefore 14 NYCRR 825.7(c)(2), 14 NYCRR 599-1.7(c)(2) and 10 NYCRR 404.7(c)(2) were clarified by adding “notwithstanding this section.”

19. A commenter asked if the treatment planning section of the regulations replace the treatment planning section in Part 822 or 599.

Response: Providers licensed by OMH or certified by OASAS still need to follow 14 NYCRR Parts 599 and 822, respectively. The treatment planning section in these regulations applies to the extent that integrated services are offered. The agencies are developing a guidance document that will provide additional instruction in treatment plan development.

20. A commenter stated that the treatment planning requirements of “factors” to be considered (14 NYCRR 825.7(e), 14 NYCRR 599-1.7(e) and 10 NYCRR 404.7(e)) are too prescriptive and should be made more flexible.

Response: The factors identified are critical to ensuring a patient’s behavioral health needs are appropriately assessed and identified and that an acceptable plan of care is developed. These are the minimum factors to be considered and providers may choose to expand on them.

21. A commenter recommended that the language related to discharge planning be eliminated because many patients will never be discharged and always require continuing care.

Response: Planning for “discharge” from behavioral health treatment is a critical part of the treatment planning process. The agencies are developing a guidance document that will provide additional instruction on continuing care and discharge planning.

22. A commenter stated that problem areas in a treatment plan should not be limited to patient-identified problem areas but should also include provider-identified problem areas.

Response: These are the minimum areas to be considered and providers may choose to expand on them and include provider-identified areas.

23. A commenter recommended that that list of identified psychotherapy services identified in 14 NYCRR 825.9, 14 NYCRR 599-1.8 and 10 NYCRR 404.9 should permit the use of telemedicine.

Response: These regulations do not prohibit the use of telemedicine to the extent otherwise permitted.

24. Commenters raised concerns over limiting substance use disorder counseling to two distinct methods, individual and group, both of which require face-to face delivery.

Response: 14 NYCRR 828.9(c)(3), 14 NYCRR 599-1.9(c)(3) and 10 NYCRR 404.9(c)(3) state “Integrated services providers of substance use disorder services shall offer, at a minimum, each of the following services...” The regulations do not prohibit the use of telemedicine to the extent otherwise permitted.

25. Commenters raised concerns over the creation of additional, expensive and/or redundant environmental/physical plant standards and the dichotomy in the standards between providers currently licensed and those licensed after the effective date of the regulations.

Response: The regulations provide additional flexibility to accommodate existing space for providers adding primary care services. Providers with three or fewer examination rooms need to follow only the environmental/physical plant standards as set forth in the new regulations.

Prospective providers that have never obtained a license or certification from any of the three agencies prior to the effective date of the new regulations and therefore are not using any licensed or certified space will be required to follow existing Article 28 standards in the provision of primary care.

26. A commenter stated that the creation of additional burdens based on whether there are 3 or less examination rooms creates a potential barrier to behavioral health providers that want to add primary care.

Response: The additional requirements are necessary in settings with over 3 examination rooms to ensure patient health and safety in light of the higher volume of primary care visits.

27. A commenter suggested that the state adopt the 2010 edition of NFPA 101 Life Safety Code instead of referencing the outdated 2000 edition.

Response: The regulations rely on the most recently adopted version of the Life Safety Code but includes categorical waivers that have been issued by CMS based on the 2012 Life Safety Code to provide a standard that is consistent with NFPA current updates.

28. A commenter stated that the quality assurance requirements for providers of primary care should not be in addition to those already required of primary care providers under 10 NYCRR 405.6.

Response: The quality assurance requirements contained in 14 NYCRR 825.11(a)(1), 14 NYCRR 599-1.11(a)(1) and 10 NYCRR 404(a)(1) apply only to those providers adding primary care. They are not additional requirements for Article 28 providers adding behavioral health services.

29. A commenter stated that the regulations have criteria for medical directors where primary care and substance use disorder services are provided but inquired as to whether integrated service providers adding mental health are required to have a medical director. If so, there should be discretion as to whether this is a full-time or part-time medical director.

Response: The regulations require providers adding primary care or substance use disorder services to utilize a medical director. Providers adding mental health services do not have a similar requirement; however, such providers will already have a medical director in place due to their existing licensure or certification by DOH or OASAS.

30. A commenter stated that the development of integrated care records is essential and recommended that the regulations be amended to state that patient consent to integrated care constitutes compliance with state and federal disclosure requirements.

Response: The regulations reflect the importance of integrated patient records. The regulations do not prohibit the use of patient consent for purpose of providing integrated care. The agencies are developing a guidance document which will provide additional instruction on recordkeeping and consent issues.

31. A commenter seeks clarification on whether the authority to provide integrated services extends system-wide or is site-specific.

Response: The approval is site specific; however providers can have multiple sites approved. There is no limit on the number of sites for which a provider can seek approval.

32. A commenter asked about how the new deeming law authorizing OMH and OASAS to accept hospital accreditation from a national organization in lieu of separate, duplicate state surveys will interact with the survey process for integrated service providers.

Response: The new deeming law has not been operationalized in ambulatory behavioral health settings yet. OMH and OASAS have started to work on a plan to allow deeming in these settings. This plan will address integrated service providers.

33. Commenters raised concerns over billing and rates not being addressed in the regulation and the need to have one billing process to streamline the system.

Response: The agencies will provide Medicaid billing and claiming guidance which addresses the complexities in each service category. Generally, providers will be encouraged to submit a single APG claim for each visit (including those comprising multiple service types) with all the procedures/services rendered on that date of service using the host's assigned Integrated Services rate codes. Medicaid managed care plans will be notified of the Department of Health's Medicaid billing/reimbursement policies as they relate to the types integrated services rendered by rendering providers.

34. A commenter stated that CASAC was eliminated from the qualified health professional list in outpatient mental health clinics and recommended that CASACs should be part of the joint license for billing purposes.

Response: Currently CASAC's are not considered qualified health professionals in OMH and DOH clinics. CASACs can be used for delivery of substance use disorder services in any approved integrated setting that has authority from OASAS to deliver substance use disorder services, provided that all other applicable staffing requirements are met.

35. A commenter recommended adding language to the policies and procedures section about using electronic medical records and sharing information.

Response: The regulations do not prohibit electronic medical records and information sharing. The manner of recordkeeping is left up to the provider.

36. A commenter asked why group counseling for substance use disorder treatment is limited to 15 people when there is no such limit for other disciplines.

Response: These requirements are consistent with current OASAS requirements and best practices in substance use disorder treatment.

37. A commenter requested clarification of "staff and appropriate equipment" needed to deliver primary care services.

Response: Provider must ensure that they have the staff and equipment necessary to provide services that are consistent with prevailing standards of care.

38. A commenter asked what the periodic reviews of primary care services with behavioral health services entail in the context of a quality assurance program.

Response: Periodic reviews are required as part of a provider's quality assurance program, which must be designed to verify that providers have processes in place for the provision of quality and appropriate care.

39. A commenter recommended that the quality assurance, utilization review and incident reporting sections be consolidated into a single set as they are overly burdensome and do not foster true integration.

Response: These sections were designed to promote flexibility for participating providers.

## NOTICE OF ADOPTION

### Medical Assistance Payments for Community Rehabilitation Services Within Residential Programs for Adults, Children, Adolescents

**I.D. No.** OMH-42-14-00002-A

**Filing No.** 1037

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Part 593 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.04 and 43.02; Social Services Law, sections 364(3) and 364-a(1)

**Subject:** Medical Assistance Payments for Community Rehabilitation Services within Residential Programs for Adults, Children, Adolescents.

**Purpose:** Provide enhancements to individuals transitioning to more independent community living through use of BIP funding.

**Text of final rule:** A new subdivision (e) is added to Section 593.7 of Title 14 NYCRR to read as follows:

*(e) In addition to the rates allowed in paragraph (1) of subdivision (c) of this section, for services provided on or after April 1, 2014, a provider shall receive the equivalent of an additional 30 percent rate add-on for up to two years for community rehabilitation services provided to adults who were discharged directly from a State psychiatric center or nursing home to a congregate residence. A provider shall receive the equivalent of an additional 15 percent rate add-on for up to three years for community rehabilitation services provided to adults who were discharged directly from a State psychiatric center or nursing home to an apartment residence.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 593.7(e).

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

#### Revised Regulatory Impact Statement

A revised Regulatory Impact Statement (RIS) is not included with this notice since the change to the final adopted rule does not necessitate a change to the RIS. In the final adopted rule, the word "individuals" has been changed to "adults." This non-substantive revision clarifies OMH's intent and is consistent with the State Balancing Incentive Payment (BIP) Program Grant.

#### Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not included with this notice since the non-substantive change serves to clarify OMH's intent and ensure consistency with the State Balancing Incentive Payment (BIP) Program Grant. In the final adopted rule, the word "individuals" has been changed to read "adults." The amendment will not have an adverse economic impact upon small businesses or local governments.

**Revised Rural Area Flexibility Analysis**

A revised Rural Area Flexibility Analysis is not included with this notice since the non-substantive change serves to clarify OMH's intent and ensure consistency with the State Balancing Incentive Payment (BIP) Program Grant. In the final adopted rule, the word "individuals" has been changed to read "adults." The amendment will not impose any adverse economic impact on rural areas.

**Revised Job Impact Statement**

A revised Job Impact Statement is not included with this notice since the non-substantive change serves to clarify OMH's intent and ensure consistency with the State Balancing Incentive Payment (BIP) Program Grant. In the final adopted rule, the word "individuals" has been changed to read "adults." As is evident from the subject matter, the amendments to 14 NYCRR Part 593 will not have an impact on jobs or employment opportunities.

**Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

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## Office for People with Developmental Disabilities

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### EMERGENCY RULE MAKING

#### Implementation of the Protection of People with Special Needs Act and Reforms to Incident Management

**I.D. No.** PDD-52-14-00010-E

**Filing No.** 1046

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Parts 624, 633 and 687; and addition of Part 625 to Title 14 NYCRR.

**Statutory authority:** L. 2012, ch. 501; Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December 2012, the Governor signed the Protection of People with Special Needs Act (PPSNA). This new law created the Justice Center for the Protection of People with Special Needs (Justice Center) and established many new protections for vulnerable persons, including a new system for incident management in services operated or certified by OPWDD and new requirements for more comprehensive and coordinated pre-employment background checks.

OPWDD filed emergency regulations effective June 30, 2013 through September 25, 2013, and replacement emergency regulations effective September 26, 2013; December 25, 2013; March 24, 2014; June 22, 2014; and September 17, 2014 to implement many of the provisions contained in the PPSNA. The September 27, 2014 replacement emergency regulations are now expiring. New emergency regulations are necessary to continue implementing regulations that are in conformance with the PPSNA. If OPWDD did not file new emergency regulations effective December 15, 2014, regulatory requirements would revert to the regulations that were in effect prior to June 30, 2013.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals with developmental disabilities who receive services in the OPWDD system. If OPWDD did not promulgate regulations on an emergency basis, many of the protections established by the PPSNA vital to the health, safety, and welfare of individuals with developmental disabilities would not be implemented or would be

implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from inconsistent requirements. For example, the emergency regulations change the categories of incidents to conform to the categories established by the PPSNA. Without the promulgation of these amendments, agencies would be required to report incidents based on one set of definitions to the Justice Center and incidents based on a different set of definitions to OPWDD. Requirements for the management of incidents would also be inconsistent. Especially concerning regulatory requirements related to incident management and pre-employment background checks, it is crucial that OPWDD regulations are changed to support the new requirements in the PPSNA so that this initiative is implemented in a coordinated fashion.

OPWDD was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes. OPWDD is making a number of revisions in the new emergency regulations, compared with the June 30, 2013; September 26, 2013; December 25, 2013; March 24, 2014; June 22, 2014; and September 17, 2014 regulations, based on input from the field and the Justice Center, and experience with the new systems and requirements gained over the past eighteen months. By filing new emergency regulations, OPWDD is able to revise the regulations to reflect recent input and current needs.

**Subject:** Implementation of the Protection of People with Special Needs Act and reforms to incident management.

**Purpose:** To enhance protections for people with developmental disabilities served in the OPWDD system.

**Substance of emergency rule:** The emergency regulations conform OPWDD regulations to Chapter 501 of the Laws of 2012 (Protection of People with Special Needs Act or PPSNA) by making a number of revisions. The major changes to OPWDD regulations made to implement the PPSNA are:

- Revisions to 14 NYCRR Part 624 (now titled "Reportable incidents and notable occurrences") to incorporate categories of "reportable incidents" as established by the PPSNA. Programs and facilities certified or operated by OPWDD must report "reportable incidents" to the Vulnerable Persons' Central Register (VPCR), a part of the Justice Center for the Protection of People with Special Needs (Justice Center). Part 624 is amended to incorporate other revisions related to the management of reportable incidents in conformance with various provisions of the PPSNA.

- Revisions to 14 NYCRR Section 633.7 concern the code of conduct adopted by the Justice Center in accordance with Section 554 of the Executive Law and impose requirements on programs certified or operated by OPWDD. The code of conduct must be read and signed by custodians who have regular and direct contact with individuals receiving services as specified in the regulations.

- Revisions to 14 NYCRR Section 633.22 reflect the consolidation of the criminal history record check function in the Justice Center. The Justice Center will receive requests for criminal history record checks and will process those requests, instead of OPWDD.

- A new 14 NYCRR Section 633.24 contains requirements for background checks (in addition to criminal history record checks).

- Revisions to Part 687 incorporate changes to criminal history record check and background check requirements in family care homes.

The regulations include numerous changes associated with incident management or the implementation of the PPSNA. These changes include:

- The amendments delete the current categories and definitions of events and situations that must be reported to agencies and OPWDD. The amendments add definitions of "reportable incidents." Types of reportable incidents are "abuse," "neglect," and "significant incidents." The amendments also add definitions of "notable occurrences." Part 624 includes requirements for reporting and investigating these types of events.

- The requirements of Part 624 are limited to events and situations that occur under the auspices of an agency.

- A new Part 625 contains requirements that apply to events and situations which are not under the auspices of an agency.

- The amendments mandate the use of OPWDD's Incident Report and Management Application (IRMA), a secure electronic statewide incident reporting system, for reporting information about specified events and situations, and remove the current requirement to submit a paper based incident report to OPWDD in certain instances.

- The amendments make several changes to requirements for investigations. The amendments require that investigations of specified events and situations be initiated immediately following occurrence or discovery (with limitations when it is anticipated that the Justice Center or the Central Office of OPWDD will conduct the investigation). Investigations conducted by agencies must be completed no later than thirty days after the initiation of an investigation, unless the agency documents an acceptable justification for an extension of the thirty-day time frame. The

amendments also add new requirements to enhance the independence of investigators, and require agency investigators to use a standardized investigative report format.

- The amendments make several changes regarding Incident Review Committees (IRC). The amendments change requirements concerning membership of the IRC and include specific provisions concerning shared committees, using another agency's committee or making alternative arrangements for IRC review. The amendments also modify the responsibilities of a provider agency's IRC when an incident is investigated by the Central Office of OPWDD or the Justice Center.

- The amendments expand on requirements for notification to service coordinators.

- The amendments contain an explicit requirement that providers must comply with OPWDD recommendations concerning a specific event or situation or must explain its reasons for not complying with a recommendation within a month of the recommendation being made.

- When the Justice Center makes findings concerning matters referred to its attention and the Justice Center issues a report and recommendations to the agency regarding such matters, the agency is required to make a written response to OPWDD within sixty days of receipt of such report, of action taken regarding each of the recommendations in the report.

- The amendments add a requirement that agencies retain records pertaining to incidents and allegations of abuse for a minimum time period of seven years. In cases when there is a pending audit or litigation, the pertinent records must be retained throughout the pendency of the audit or litigation. The amendments specify what information must be retained.

- The amendments add requirements that agencies check the "Staff Exclusion List" of the Vulnerable Persons' Central Register as a part of the background check process.

- The amendments also include requirements concerning background checks for prospective employees and volunteers to determine if an applicant was involved in substantiated abuse or neglect in the OPWDD system before June 30, 2013. These requirements are added to implement section 16.34 on the Mental Hygiene Law as amended by the PPSNA.

- In accordance with changes in Section 424-a of the Social Services Law, the amendments extend requirements for checks of the Statewide Central Register of Child Abuse and Maltreatment to employees and others that have the potential for regular and substantial contact with individuals receiving services in programs certified or operated by OPWDD. Prior to June 30, 2013, providers were only required to request an SCR check for those who have the potential for regular and substantial contact with children.

- Definitions are changed in Parts 624 and 633 to conform to PPSNA definitions.

- The amendments include revisions to reflect the restructuring of entities within OPWDD and OPWDD's name change.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 14, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Janet Felker, Regulatory Affairs Unit, Office for People With Developmental Disabilities, 44 Holland Avenue, 3rd Floor, Albany, NY 12229, (518) 474-1830, email: RAU.Unit@opwdd.ny.gov

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described will have no effect on the environment, and an E.I.S. is not needed.

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

a. Chapter 501 of the Laws of 2012 (Protection of People with Special Needs Act), added Article 20 to the Executive Law and Article 11 to the Social Services Law and amended other laws including the Mental Hygiene Law. Chapter 501 incorporates requirements for implementing regulations by "State Oversight Agencies," which include OPWDD.

b. OPWDD has the statutory responsibility to provide and encourage the provision of appropriate programs and services in the area of care, treatment, rehabilitation, education, and training of persons with developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

c. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

d. OPWDD has the statutory authority to adopt regulations concerning the operation of programs, provision of services and facilities pursuant to the New York State Mental Hygiene Law Section 16.00.

2. Legislative Objectives: These emergency amendments further the legislative objectives embodied in Chapter 501 of the Laws of 2012 (Protection of People with Special Needs Act) and sections 13.07,

13.09(b), and 16.00 of the Mental Hygiene Law. The emergency amendments incorporate a number of reforms to OPWDD regulations in order to increase protections and improve the quality of services provided to people with developmental disabilities in OPWDD's system.

3. Needs and Benefits: The majority of the amendments include extensive new and modified requirements for OPWDD regulations in 14 NYCRR Part 624 pertaining to incident management. Additional amendments add and revise requirements in other OPWDD regulations in order to implement the Protection of People with Special Needs Act (PPSNA).

The PPSNA requires the establishment of comprehensive protections for vulnerable persons, including people with developmental disabilities, against abuse, neglect, and other harmful conduct. The PPSNA created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems. The Justice Center operates a 24/7 hotline for reporting abuse, neglect, and significant incidents in accordance with the PPSNA's provisions for uniform definitions, mandatory reporting, and minimum standards for incident management programs. In collaboration with OPWDD, the Justice Center is also charged with developing and delivering appropriate training for caregivers, their supervisors, and investigators. Additionally, the Justice Center is responsible for conducting criminal background checks for applicants in the OPWDD system.

The PPSNA creates a Vulnerable Persons' Central Register (VPCR). This register will contain the names of custodians found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All custodians found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Custodians having committed egregious or repeated acts of abuse or neglect are prohibited from future employment in providing services for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

Pursuant to the PPSNA, the Justice Center is charged with recommending policies and procedures to OPWDD for the protection of people with developmental disabilities; this effort involves the development of requirements and guidelines in areas including but not limited to incident management, rights of people receiving services, criminal background checks, and training of custodians. In accordance with the PPSNA, these requirements and guidelines must be reflected, wherever appropriate, in OPWDD's regulations. Consequently, these amendments incorporate the requirements in regulations and guidelines developed by the Justice Center.

The amendments also make numerous changes to OPWDD's incident management process to strengthen the process and to provide further protection to people receiving services from harm and abuse. For example, the amendments make changes related to definitions, reporting, investigation, notification, and committee review of events and situations both under and not under the auspices of OPWDD or a provider agency. It is OPWDD's expectation that implementation of the emergency amendments will enhance safeguards for people with developmental disabilities, which will in turn allow individuals to focus on achieving maximum independence and living richer lives.

The amendments also include requirements addressing background checks for prospective employees and volunteers to determine if an applicant was involved in substantiated abuse or neglect in the OPWDD system before June 30, 2013, in accordance with section 16.34 on the Mental Hygiene Law. These requirements, applicable to all programs and services operated, certified, approved, and/or funded by OPWDD, will augment the protections provided to people receiving services by the PPSNA.

##### 4. Costs:

a. Costs to the Agency and to the State and its local governments: OPWDD will not incur significant additional costs as a provider of services. While the regulations impose new requirements on providers, OPWDD expects that they will comply with the new requirements with no additional staff. Furthermore, OPWDD has already implemented some of the new requirements contained in the regulations in state-operated services through implementation of policy/procedure changes. There may be minimal one-time costs associated with notification and training of staff.

The PPSNA creates the Justice Center, which will assume designated functions that are now performed by OPWDD. The Justice Center will manage the criminal background check process and will conduct some investigations that had previously been conducted by OPWDD. OPWDD will experience savings associated with the reduction in staff performing these functions; however, the staff will be shifting to the Justice Center so the net effect will be cost neutral. Minimal additional OPWDD staff will be needed to implement some provisions of the PPSNA and implementing regulations, such as staff to coordinate MHL 16.34 background checks.

Any costs or savings will have no impact on Medicaid rates, prices or fees. Therefore, there is no impact on New York State in its role paying for Medicaid services.

There are no costs to local governments as there are no changes to Medicaid reimbursement and even if there were, the contribution of local governments to Medicaid has been capped. Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level.

b. Costs to private regulated parties: It is difficult to estimate the cost impact on private regulated parties, however, OPWDD expects that cost to providers will be minimal. OPWDD already requires the reporting and investigation of incidents. The implementation of these reforms in general will not result in costs. There may be costs associated with the amendment of Section 424-a of the Social Service Law (as reflected in these regulations) which requires background checks of the Statewide Central Register of Child Abuse and Maltreatment (which cost \$25 per check). However, OPWDD cannot estimate how many additional checks will be required. There may also be additional costs associated with the need for clinical assessments needed to demonstrate psychological abuse. There may be costs associated with the requirement that agencies conduct a "reasonably diligent search" for records of past abuse/neglect related to background checks required in accordance with Section 16.34 of the Mental Hygiene Law. Again, OPWDD is not able to estimate these cost impacts. Concerning the reforms to Part 624 that are in addition to the changes needed to implement the PPSNA, most of the amendments have either already been implemented by OPWDD policy directives (e.g. mandate to use IRMA), merely clarify existing requirements or interpretive guidance, or can be implemented without cost to the agency (e.g. restrictions on committee review).

There may be minor costs as a result of other amendments; however, OPWDD anticipates that generally any potential costs incurred would be mitigated by savings that the provider will realize from the improvements to the incident management process. OPWDD expects that in the long-term the amendments will ultimately reduce incidents and abuse in its system and increase efficiency and quality in the reporting, investigation, notification, and review of such events. OPWDD is not able to quantify the minor potential costs or the savings that might be realized by the promulgation of these amendments.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village, or school, fire, or other special district.

6. Paperwork: The new regulations require additional paperwork to be completed by providers. Examples of additional paperwork are found in new requirements pertaining to reporting reportable incidents to the Justice Center and making additional notifications. The regulations require that all custodians with regular and direct contact in programs certified or operated by OPWDD review and sign the Justice Center's code of conduct on an annual basis. In addition, new paperwork is associated with the requirements for additional background checks (Staff Exclusion List, MHL 16.34 and Statewide Central Register of Child Abuse and Maltreatment). However, the regulations remove paperwork requirements in other ways, such as the deletion of the requirement for the completion of a paper based incident report for specified events or situations.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities. In some instances, the regulations reiterate requirements in NYS law.

8. Alternatives: Current definitions of incidents in OPWDD regulations that require reporting and investigation exceed the criteria in the new statutory definitions in the PPSNA. OPWDD considered reducing or eliminating requirements applying to events and situations that do not meet the criteria in the statutory definitions for "reportable incidents," but OPWDD decided to include the continuation of protections associated with these events and situations as reflected in the definitions of notable occurrences.

9. Federal Standards: The emergency amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The regulations will be effective on September 17, 2014 to ensure continued compliance with Chapter 501 of the Laws of 2012. The emergency regulations replace prior emergency regulations that were effective September 17, 2014 and expired on December 14, 2014.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded services are provided by non-profit agencies that employ more than 100 people overall. However, some smaller agencies that employ fewer than 100 employees overall would be classified as small businesses. Currently, there are approximately 700 agencies providing services that are certified, authorized or funded by OPWDD. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The amendments have been reviewed by OPWDD in light of their impact on small businesses. The regulations make extensive changes to OPWDD's requirements for incident management that will necessitate significant changes in compliance activities and result in additional costs and savings to providers, including small business providers. However, OPWDD is unable to quantify the potential additional costs and savings to providers as a result of these amendments. In any event, OPWDD considers that the improvements in protections for people served in the OPWDD system will help safeguard individuals from harm and abuse and that the benefits more than outweigh any potential negative impacts on providers.

2. Compliance requirements: The regulations add a number of new requirements with which providers must comply. Amendments associated with the implementation of the PPSNA include a requirement that providers report "reportable incidents" and deaths to the Justice Center. In addition, the regulations impose an obligation on providers to obtain an examination for physical injuries. For psychological abuse, a clinical assessment could be needed in order to demonstrate the impact of suspected psychological abuse. While OPWDD anticipates that providers are already obtaining examinations of physical injuries, clinical assessments of suspected psychological abuse are not generally obtained.

The regulations impose requirements that all new custodians with regular and direct contact in such programs must read and sign the code of conduct at the time of employment or affiliation, and that all custodians with regular and direct contact in such programs must read and sign the code of conduct at an annual basis.

The PPSNA expanded requirements to obtain background checks of the Statewide Central Register of Child Abuse and Maltreatment to require checks of employees (and others) who have the potential for regular and substantial contact with individuals receiving services in programs that are certified or operated by OPWDD. Prior to June 30, 2013 the statute limited this requirement to employees who have the potential for regular and substantial contact with children. The emergency regulations reflect the statutory changes to section 424-a of the Social Services Law in the PPSNA. While many providers that also serve children have been obtaining these checks, the new requirements clearly expand the pool of employees and others who must be checked. Further, OPWDD regulations require that agencies conduct SCR checks of applicants when the check is permitted by the Social Services Law.

The regulations also include requirements addressing background checks for potential employees and volunteers to determine if an applicant was involved in substantiated abuse or neglect in the OPWDD system before June 30, 2013, in accordance with section 16.34 on the Mental Hygiene Law.

Prior OPWDD regulations already required reporting and investigation of incidents, and that providers request criminal background checks. While the amendments incorporate many changes and reforms, the basic requirements are conceptually unchanged. OPWDD therefore expects that additional compliance activities (except as noted above) will be minimal. Aside from the provisions related to implementation of the PPSNA, and section 16.34 of the Mental Hygiene Law, the amendments have either already been implemented by OPWDD policy directives, clarify existing requirements or interpretive guidance, or can be implemented without cost to the agency.

Agencies must comply with the new requirement to complete investigations within a 30 day timeframe. Agencies must also comply with new requirements to enhance the independence of investigators and agency incident review committees. However, OPWDD expects that additional compliance activities will be minimal since agencies are already required to comply with existing requirements that prohibit situations which compromise the independence of investigators and committee members.

The new requirements pertaining to the dissemination of agency policies and procedures, OPWDD incident management regulations, and written information specified by OPWDD add new compliance activities; however, the regulations minimize compliance activities by requiring that providers offer to provide such information in electronic format (unless paper copies are specifically requested) as opposed to requiring the provision of paper copies only. The amendments require that information be provided in conjunction with training that is mandated by current regulations in order to consolidate efforts, increase efficiency, and reduce compliance activities.

Enhancements in required notification to service coordinators will also add compliance activities for providers because providers will have to make additional notifications and/or provide subsequent information about an incident or occurrence to these parties.

The amendments that add a new requirement that agencies enter minutes of their incident review committee meetings into IRMA within three weeks of the meeting for serious incidents, allegations of abuse, and all deaths, may result in a minimal amount of additional clerical work. OPWDD expects that most agencies have adopted an electronic record-keeping system to maintain their minutes and that these agencies would

only have to copy and paste their minutes into IRMA. Agencies that do not have an electronic recordkeeping system and that maintain handwritten or typed minutes will have to assign staff to type the minutes into IRMA. OPWDD expects that these agencies will add this task to the duties of clerical staff who are trained and experienced in data entry and who can perform this function in an efficient manner.

The amendments extend access to information in accordance with Jonathan's Law and add a new requirement that agencies retain records pertaining to incidents and allegations of abuse for a minimum time period of seven years. In cases when there is a pending audit or litigation, the pertinent records must be retained throughout the pendency of the audit or litigation. The amendments specify what information must be retained. OPWDD considers that the new requirements will not add any additional compliance activities for agencies. OPWDD expects that generally most agencies have been implementing agency specific policies on record retention and that the new required record retention schedule merely standardizes existing policies/procedures. The amendments will have no effect on local governments.

3. Professional services: There may be additional professional services required for small business providers as a result of these amendments. The definition of psychological abuse references specific impacts on an individual receiving services that must be supported by a clinical assessment. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There may be modest costs for small business providers associated with the amendments. There may be costs associated with obtaining a clinical assessment in the case of suspected psychological abuse. Additionally, there may be nominal costs for agencies to comply with the expanded notification requirements and requirements for the provision of policies and procedures when it is necessary to provide paper copies of information to the appropriate parties upon request. There are costs associated with the change to Section 424-a of the Social Services Law and OPWDD regulations which will require agencies to obtain additional background checks for employees and other individuals associated with the agencies. These checks cost \$25 per check. However, OPWDD is unable to estimate how many additional checks will be needed and therefore cannot estimate the cost impact. There may be costs associated with new background check requirements in MHL 16.34, including costs associated with the requirement that agencies conduct a "reasonably diligent search" for past records of abuse/neglect. There may also be costs associated with requirements that agencies request a search of the "Staff Exclusion List." There may be costs associated with the requirement to train members of the Incident Review Committee.

Providers may experience savings if the Justice Center or OPWDD assume responsibility for investigations that were previously conducted by provider agency staff.

In the long term, compliance activities associated with the implementation of these amendments are expected to reduce future incidents and abuse, resulting in savings for providers as well as benefits to the wellbeing of individuals receiving services.

5. Economic and technological feasibility: The amendments may impose the use of new technological processes on small business providers. Providers have already been reporting incidents and abuse in IRMA in accordance with an existing OPWDD policy directive so the new requirements related to IRMA do not impose the use of new technological processes on small business providers. However, requirements to report reportable incidents to the Justice Center in the manner specified by the Justice Center may impose a requirement to use an electronic reporting system for that purpose, if that is the manner specified by the Justice Center. Currently the Justice Center is directing that reports be made either by telephone or by using a Web form, so the use of the Web form is optional.

6. Minimizing adverse economic impact: The amendments may result in an adverse economic impact for small business providers due to additional compliance activities and associated compliance costs. However, as stated earlier, OPWDD expects that compliance with these new regulations will result in savings in the long term and there may be some short term savings as a result of the conduct of investigations by the Justice Center. Further, OPWDD expects that the amendments will provide some relief to providers by the removal of the previous requirement for a paper based incident report for reporting serious reportable incidents, allegations of abuse, and all deaths. OPWDD expects that these provisions will mitigate any adverse economic impact that results from complying with other new requirements.

OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. OPWDD modified several requirements to minimize adverse economic impact. As noted above, OPWDD eliminated the requirement that agencies complete paper forms when information about incidents is submitted electronically. In addition, the new regula-

tions allow agencies to provide instructions on how to access information on incident management electronically to individuals, families and others, rather than requiring the provision of paper copies in all instances. Agencies are only required to make paper copies available upon request. OPWDD did not consider the exemption of small businesses from the amendments or the establishment of differing compliance or reporting requirements since OPWDD considers compliance with the emergency amendments to be crucial for the health, safety, and welfare of the individuals served by small business providers. Related to the requirement to conduct background checks in accordance with Section 16.34 of the Mental Hygiene Law, OPWDD has implemented several significant measures to streamline the process, such as the use of web-based forms.

7. Small business participation: The PPSNA was originally a Governor's Program Bill which received extensive media attention. Providers have had opportunities to become familiar with its provisions since it was made available on various government websites during June 2013. Related to the components of the regulations that are unrelated to implementation of the PPSNA, draft regulations containing these components were sent out for review and comment to representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 12, 2012. Some of the members of NYSACRA have fewer than 100 employees. OPWDD carefully considered the comments received and made some suggested changes to the amendments (e.g. eliminated the paper based incident report and allowed for the provision of policies and procedures in electronic format). OPWDD also presented the reforms at a widely-attended provider training in the fall of 2012. OPWDD also hosted many informational sessions regarding the requirements in the prior emergency regulations during the spring and summer of 2013, including in-person sessions, webinars and state-wide videoconferences. OPWDD informed providers about the new requirements and invited public comment on the requirements. OPWDD has also responded to numerous questions and comments on prior emergency regulations. Finally, OPWDD has posted extensive information about the new requirements on its website.

8. (IF APPLICABLE) For rules that either establish or modify a violation or penalties associated with a violation: The emergency amendments do not establish or modify a violation or penalties associated with a violation.

#### *Rural Area Flexibility Analysis*

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The amendments have been reviewed by OPWDD in light of their impact on rural areas. The regulations make extensive changes to OPWDD's requirements for incident management that will necessitate significant changes in compliance activities and result in additional costs and savings to providers, including small business providers. However, OPWDD is unable to quantify the potential additional costs and savings to providers as a result of these amendments. In any event, OPWDD considers that the improvements in protections for people served in the OPWDD system will help safeguard individuals from harm and abuse and that the benefits more than outweigh any potential negative impacts on providers.

The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Compliance requirements: The regulations add a number of new requirements with which providers must comply. Amendments associated with the implementation of the PPSNA include a requirement that providers report "reportable incidents" and deaths to the Justice Center. In addition, the regulations impose an obligation on providers to obtain an examination for physical injuries. For psychological abuse, a clinical assessment could be needed in order to demonstrate the impact of suspected psychological abuse. While OPWDD anticipates that providers are already obtaining examinations of physical injuries, clinical assessments of suspected psychological abuse are not generally obtained.

The regulations impose requirements that all new custodians with regular and direct contact in such programs must read and sign the code of conduct at the time of employment or affiliation, and that all custodians with regular and direct contact in such programs must read and sign the code of conduct on an annual basis.

The PPSNA expanded requirements to obtain background checks of the

Statewide Central Register of Child Abuse and Maltreatment to require checks of employees (and others) who have the potential for regular and substantial contact with individuals receiving services. Prior to June 30, 2013 the statute limited this requirement to employees who have the potential for regular and substantial contact with children. The emergency regulations reflect the statutory changes to section 424-a of the Social Services Law in the PPSNA. While many providers that also serve children have been obtaining these checks, the new requirements clearly expand the pool of employees who must be checked. Further, OPWDD regulations require that agencies conduct SCR checks of applicants when the check is permitted by the Social Services Law.

The regulations also include requirements addressing background checks for prospective employees and volunteers to determine if an applicant was involved in substantiated abuse or neglect in the OPWDD system before June 30, 2013, in accordance with section 16.34 on the Mental Hygiene Law. Agencies are also required to request a check of the Staff Exclusion List maintained by the Justice Center.

Prior OPWDD regulations already required reporting and investigation of incidents, and that providers request criminal background checks. While the amendments incorporate many changes and reforms, the basic requirements are conceptually unchanged. OPWDD therefore expects that additional compliance activities (except as noted above) will be minimal. Aside from the provisions related to implementation of the PPSNA, and section 16.34 of the Mental Hygiene Law, the amendments have either already been implemented by OPWDD policy directives, clarify existing requirements or interpretive guidance, or can be implemented without cost to the agency.

Agencies must comply with the new requirement to complete investigations within a 30 day timeframe. Agencies must also comply with new requirements to enhance the independence of investigators and agency incident review committees. However, OPWDD expects that additional compliance activities will be minimal since agencies are already required to comply with existing requirements that prohibit situations which compromise the independence of investigators and committee members.

The new requirements pertaining to the dissemination of agency policies and procedures, OPWDD incident management regulations, and written information specified by OPWDD add new compliance activities; however, the regulations minimize compliance activities by requiring that providers offer to provide such information in electronic format (unless paper copies are specifically requested) as opposed to requiring the provision of paper copies only. The amendments require that information be provided in conjunction with training which is mandated by current regulations in order to consolidate efforts, increase efficiency, and reduce compliance activities.

Enhancements in required notification to service coordinators will also add compliance activities for providers because providers will have to make additional notifications and/or provide subsequent information about an incident or occurrence to these parties.

The amendments that add a new requirement that agencies enter minutes of their incident review committee meetings into IRMA within three weeks of the meeting for serious incidents, allegations of abuse, and all deaths, may result in a minimal amount of additional clerical work. OPWDD expects that most agencies have adopted an electronic record-keeping system to maintain their minutes and that these agencies would only have to copy and paste their minutes into IRMA. Agencies that do not have an electronic recordkeeping system and that maintain handwritten or typed minutes will have to assign staff to type the minutes into IRMA. OPWDD expects that these agencies will add this task to the duties of clerical staff who are trained and experienced in data entry and who can perform this function in an efficient manner.

The amendments extend access to information in accordance with Jonathan's Law and add a requirement that agencies retain records pertaining to incidents and allegations of abuse for a minimum time period of seven years. In cases when there is a pending audit or litigation, the pertinent records must be retained throughout the pendency of the audit or litigation. The amendments specify what information must be retained. OPWDD considers that the new requirements will not add any additional compliance activities for agencies. OPWDD expects that generally most agencies have been implementing agency specific policies on record retention and that the new required record retention schedule merely standardizes existing policies/procedures. The amendments will have no effect on local governments.

3. Professional services: There may be additional professional services required for small business providers as a result of these amendments. The definition of psychological abuse references specific impacts on an individual receiving services that must be supported by a clinical assessment. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There may be modest costs for small business providers associated with the amendments. There may be costs associated

with obtaining a clinical assessment in the case of suspected psychological abuse. Additionally, there may be nominal costs for agencies to comply with the expanded notification requirements and requirements for the provision of policies and procedures when it is necessary to provide paper copies of information to the appropriate parties upon request. There are costs associated with the change to Section 424-a of the Social Services Law and OPWDD regulations which will require agencies to obtain additional background checks for employees and other individuals associated with the agencies. These checks cost \$25 per check. However, OPWDD is unable to estimate how many additional checks will be needed and therefore cannot estimate the cost impact. There may be costs associated with new background check requirements in MHL 16.34, including costs associated with the requirement that agencies conduct a "reasonably diligent search" for past records of abuse/neglect. There may also be costs associated with requirements that agencies request a search of the "Staff Exclusion List." There may be costs associated with the requirement to train members of the Incident Review Committee.

Providers may experience savings if the Justice Center or OPWDD assumes responsibility for investigations that were previously conducted by provider agency staff.

In the long term, compliance activities associated with the implementation of these amendments are expected to reduce future incidents and abuse, resulting in savings for providers as well as benefits to the wellbeing of individuals receiving services.

5. Minimizing adverse impact: The amendments may result in an adverse economic impact for small business providers due to additional compliance activities and associated compliance costs. However, as stated earlier, OPWDD expects that compliance with these new regulations will result in savings in the long term and there may be some short term savings as a result of the conduct of investigations by the Justice Center. Further, OPWDD expects that the amendments will provide some relief to providers by the removal of the previous requirement for a paper based incident report for reporting serious reportable incidents, allegations of abuse, and all deaths. OPWDD expects that these provisions will mitigate any adverse economic impact that results from complying with other new requirements.

OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. OPWDD modified several requirements to minimize adverse economic impact. As noted above, OPWDD eliminated the requirement that agencies complete paper forms when information about incidents is submitted electronically. In addition, the new regulations allow agencies to provide instructions on how to access information on incident management electronically to individuals, families and others, rather than requiring the provision of paper copies in all instances. Agencies are only required to make paper copies available upon request. Related to the requirement to conduct background checks in accordance with Section 16.34 of the Mental Hygiene Law, OPWDD has implemented several significant measures to streamline the process, such as the use of web-based forms.

OPWDD did not consider the exemption of small businesses from the emergency amendments or the establishment of differing compliance or reporting requirements since OPWDD considers compliance with the emergency amendments to be crucial for the health, safety, and welfare of the individuals served by providers in rural areas.

6. Participation of public and private interests in rural areas: The PPSNA was originally a Governor's Program Bill that received extensive media attention. Providers have had opportunities to become familiar with its provisions since it was made available on various government websites during June 2013. Related to the components of the regulations that are unrelated to implementation of the PPSNA, draft regulations containing these components were sent out for review and comment to representatives of providers, including NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, which represent providers in rural areas, on March 12, 2012. OPWDD carefully considered the comments received and made some suggested changes to the amendments (e.g. eliminated the paper based incident report and allowed for the provision of policies and procedures in electronic format). OPWDD also presented the reforms at a widely-attended provider training in the fall of 2012. OPWDD also hosted many informational sessions regarding the requirements in the prior emergency regulations during the spring and summer of 2013, including in-person sessions, webinars, and state-wide videoconferences. OPWDD informed providers about the new requirements and invited public comment on the requirements. OPWDD has also responded to numerous questions and comments on the prior emergency regulations. Finally, OPWDD has posted extensive information about the new requirements on its website.

#### **Job Impact Statement**

OPWDD is not submitting a Job Impact Statement for these amendments because OPWDD does not anticipate a substantial adverse impact on jobs and employment opportunities.

The amendments incorporate a number of reforms to improve the quality and consistency of incident management activities throughout the OPWDD system. Most of these reforms have already been implemented by OPWDD policy directive, such as the mandates to use IRMA and a standardized investigation format. Consequently these amendments will not affect jobs or employment opportunities.

The amendments that impose new requirements on providers, such as additional reporting requirements, the timeframe for completion of investigations, notification to the service coordinator and other parties of subsequent information about incidents and abuse, retention of records, and the provision of policies and procedures to specified parties, will not result in an adverse impact on jobs. OPWDD anticipates that there will be no effect on jobs as agencies will use current staff to perform the required compliance activities.

The PPSNA and these implementing regulations will require that providers request additional checks from the Statewide Central Register of Child Abuse and Maltreatment. The regulations also include requirements addressing background checks for prospective employees and volunteers to determine if an applicant was involved in substantiated abuse or neglect in the OPWDD system before June 30, 2013, in accordance with section 16.34 on the Mental Hygiene Law. OPWDD anticipates that the requests and checks will be made using current staff.

The PPSNA and these implementing regulations will also mean that some functions that are currently performed by OPWDD staff will instead be performed by the staff of the Justice Center. OPWDD expects that the volume of incidents and occurrences investigated will be roughly similar. To the extent that the Justice Center performs investigations, oversees the management of reportable incidents, and manages requests for criminal history record checks, the result is expected to be neutral in that positions lost by OPWDD will be gained by the Justice Center. OPWDD may add minimal new staff to perform functions required by the regulations, such as the requirements for MHL 16.34 checks.

It is therefore apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### Allowing KEDNY's Filing to Modify the Calculation of the Monthly Cost of Gas for Sales Customers to Become Effective

**I.D. No.** PSC-41-13-00013-A

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) to modify the calculation of the monthly cost of gas for sales customers in PSC 12—Gas, to become effective.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

**Subject:** Allowing KEDNY's filing to modify the calculation of the monthly cost of gas for sales customers to become effective.

**Purpose:** To allow KEDNY's filing to modify the calculation of the monthly cost of gas for sales customers to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing The Brooklyn Union Gas Company d/b/a National Grid NY's filing to modify the calculation of the monthly cost of gas for sales customers under Service Classification Nos. 4A-High Load Factor Service, 4A-CNG Compressed Natural Gas Equipment Service and 4B-Year-Round Air Conditioning Service in PSC No. 12. Specifically, the amount of fixed cost credits flowed back to each service classification will be set proportionate to the amount of fixed gas costs allocated to that service classification in the calculation of the monthly cost of gas, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0439SA1)

### NOTICE OF ADOPTION

#### Approving Hudson Solar's Petition to Increase Central Hudson Net Metering Minimum Caps

**I.D. No.** PSC-20-14-00012-A

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order approving a petition by Hudson Valley Clean Energy, Inc. d/b/a Hudson Solar (Hudson Solar) to increase the net metering minimum caps for Central Hudson Gas & Electric Corporation (Central Hudson).

**Statutory authority:** Public Service Law, section 66-j(3)(b)

**Subject:** Approving Hudson Solar's petition to increase Central Hudson net metering minimum caps.

**Purpose:** To approve Hudson Solar's petition to increase Central Hudson net metering minimum caps.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving the petition of Hudson Valley Clean Energy, Inc. d/b/a Hudson Solar to increase the minimum net metering limitation for the service territory of Central Hudson Gas & Electric Corporation, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0151SA1)

### NOTICE OF ADOPTION

#### Allowing KEDLI's Filing to Align the Calculation of the Monthly Cost of Gas for Sales Customers to Become Effective

**I.D. No.** PSC-21-14-00005-A

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of KeySpan Gas East Corp. d/b/a Brooklyn Union of L.I. (KEDLI) to modify the calculation of the monthly cost of gas for sales customers in PSC 1—Gas, to become effective.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Allowing KEDLI's filing to align the calculation of the monthly cost of gas for sales customers to become effective.

**Purpose:** To allow KEDLI's filing to align the calculation of the monthly cost of gas for sales customers to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing KeySpan Gas East Corp. d/b/a Brooklyn Union of L.I.'s filing to align the monthly cost of gas and adjustment provisions and statements with those filed by The Brooklyn Union Gas Company d/b/a National Grid NY in Case 13-G-0439 to modify the calculation of monthly cost of gas for sales customers under Service Classification Nos. 4A-High Load Factor Service, 4A-CNG Compressed Natural Gas Equipment Service and 4B-Year-Round Air Conditioning Service in PSC No. 12, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0163SA1)

**NOTICE OF ADOPTION**

**Allowing KEDNY's Filing to Modify the Calculation of the Monthly Cost of Gas for Sales Customers to Become Effective**

**I.D. No.** PSC-21-14-00006-A

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) to modify the calculation of the monthly cost of gas for sales customers in PSC 12—Gas, to become effective.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

**Subject:** Allowing KEDNY's filing to modify the calculation of the monthly cost of gas for sales customers to become effective.

**Purpose:** To allow KEDNY's filing to modify the calculation of the monthly cost of gas for sales customers to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing The Brooklyn Union Gas Company d/b/a National Grid NY's filing to modify the calculation of the monthly cost of gas for sales customers under Service Classification (SC) Nos. 4A-High Load Factor Service, 4A-CNG Compressed Natural Gas Equipment Service and 4B-Year-Round Air Conditioning Service in PSC No. 12—Gas. These changes will impact the calculation of the monthly cost of gas for the Company's firm sales customers provided service under SC Nos. 1, Residential; 2, General Service (Non-Residential); 3, Heating and/or Water Heating Service (Multi-Family Buildings) and 21, Base Load Distributed Generation Sales Service. Also impacted is the calculation of the fixed cost credits allocated to sellers serving transportation customers provided service under SC No. 17, Core Transportation and Swing Service, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0439SA2)

**NOTICE OF ADOPTION**

**Allowing KEDLI, in Part, to Defer Certain Cost Items**

**I.D. No.** PSC-28-14-00012-A

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing, in part, KeySpan Gas East Corporation d/b/a National Grid, to defer certain cost items in its capital spending programs and for other relief.

**Statutory authority:** Public Service Law, sections 4, 5, 64, 65 and 66

**Subject:** Allowing KEDLI, in part, to defer certain cost items.

**Purpose:** To allow KEDLI, in part to defer certain cost items.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing, in part, KeySpan Gas East Corporation d/b/a National Grid, to defer costs associated with incremental capital expenditures and establishing a surcharge, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0214SA1)

**NOTICE OF ADOPTION**

**Authorizing Accelerated Switching of Commodity Suppliers**

**I.D. No.** PSC-32-14-00011-A

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order approving Staff's proposal to authorize accelerated switching of commodity suppliers.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65 and 66

**Subject:** Authorizing accelerated switching of commodity suppliers.

**Purpose:** To authorize accelerated switching of commodity suppliers.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving the implementation of Staff's proposal authorizing accelerated switching of commodity suppliers to reduce the period between when a customer agrees to take service from an energy services company (ESCO) and when that ESCO actually begins to provide service to the customer, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-M-0476SA9)

**NOTICE OF ADOPTION**

**Allowing Con Edison's Filing to Modify the MAC to Become Effective**

**I.D. No.** PSC-32-14-00014-A

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of Consolidated Edison Company of New York, Inc. (Con Edison) to modify the Monthly Adjustment Clause (MAC) in PSC 10—Electricity, to become effective.

**Statutory authority:** Public Service Law, section 66(12)(b)

**Subject:** Allowing Con Edison's filing to modify the MAC to become effective.

**Purpose:** To allow Con Edison's filing to modify the MAC to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted

an order allowing Consolidated Edison Company of New York, Inc.'s filing to modify the Monthly Adjustment Clause in PSC No. 10—Electricity, related to charges and credits for the purchase and sale of sulfur dioxide and nitrogen oxides emission allowances to become effective, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0272SA1)

### NOTICE OF ADOPTION

#### Approving, with Modifications, Con Ed's Establishment of a BQDM Program

**I.D. No.** PSC-32-14-00016-A

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order approving, with modifications, the petition by Consolidated Edison Company of New York, Inc. (Con Ed) to establish a Brooklyn/Queens Demand Management (BQDM) Program.

**Statutory authority:** Public Service Law, sections 2(3), (4), (12), (13), 4(1), 5(1)(b), (2), 65(1), 66(1), (2), (9), (12)(b) and (e)

**Subject:** Approving, with modifications, Con Ed's establishment of a BQDM Program.

**Purpose:** To approve, with modifications, Con Ed's establishment of a BQDM Program.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving, with modifications, a petition filed by Consolidated Edison of New York, Inc. to establish a Brooklyn/Queens Demand Management Program to address an overload condition of the electric sub-transmission feeders serving the Brownsville No. 1 and 2 substations, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0302SA1)

### NOTICE OF ADOPTION

#### Authorizing Corning to Recover Some Requested Deferrals

**I.D. No.** PSC-33-14-00007-A

**Filing Date:** 2014-12-12

**Effective Date:** 2014-12-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order authorizing Corning Natural Gas Corporation (Corning) recovery of some requested deferrals.

**Statutory authority:** Public Service Law, sections 4, 5, 65 and 66

**Subject:** Authorizing Corning to recover some requested deferrals.

**Purpose:** To authorize Corning to recover some requested deferrals.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving a petition filed by Corning Natural Gas Corporation authorizing recovery of some requested deferrals, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0465SA2)

### NOTICE OF ADOPTION

#### Allowing KEDNY's Filing to Modify the Calculation of the Monthly Cost of Gas for Sales Customers to Become Effective

**I.D. No.** PSC-34-14-00004-A

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) to modify the calculation of the monthly cost of gas for sales customers in PSC 12—Gas, to become effective.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

**Subject:** Allowing KEDNY's filing to modify the calculation of the monthly cost of gas for sales customers to become effective.

**Purpose:** To allow KEDNY's filing to modify the calculation of the monthly cost of gas for sales customers to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing The Brooklyn Union Gas Company d/b/a National Grid NY's filing to modify the calculation of the monthly cost of gas for sales customers under Service Classification (SC) Nos. 4A-High Load Factor Service, 4A-CNG Compressed Natural Gas Equipment Service and 4B-Year-Round Air Conditioning Service in PSC No. 12-Gas. These changes will impact firm sales customers provided service under SC No. 1 – Residential; SC No.2 – General Service (Non-Residential), SC No. 3 – Heating and/or Water Heating Service (Multi-Family Buildings) and SC No. 21 – Base Load Distributed Generation Sales Service, and transportation customers provide service under SC No. 17 – Core Transportation and Swing Service, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0439SA3)

### NOTICE OF ADOPTION

#### Allowing KEDLI's Filing to Modify the Calculation of the Monthly Fixed Gas Cost and Fixed Cost Credit to Become Effective

**I.D. No.** PSC-34-14-00007-A

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-16

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of KeySpan Gas East Corp. d/b/a Brooklyn Union of L.I. (KEDLI) to modify the calculation of the monthly fixed gas cost and fixed cost credit components in PSC 1—Gas, to become effective.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

**Subject:** Allowing KEDLI's filing to modify the calculation of the monthly fixed gas cost and fixed cost credit to become effective.

**Purpose:** To allow KEDLI's filing to modify the calculation of the monthly fixed gas cost and fixed cost credit to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing KeySpan Gas East Corp. d/b/a Brooklyn Union of L.I.'s filing to modify the fixed gas cost component and the fixed cost credit component of the monthly cost of gas under Service Classification (SC) Nos. 4A-High Load Factor Service, 4A-CNG Compressed Natural Gas Equipment Service and 4B-Year-Round Air Conditioning Service in PSC No. 1. These changes will impact the calculation of the monthly cost of gas for the Company's firm sales customers provided service under SC No. 1 – Residential; SC No. 2 – General Service (Non-Residential); SC No. 3 – Heating and/or Water Heating Service (Multi-Family Buildings) and SC No. 21 – Base Load Distributed Generation Sales Service. Also impacted is the calculation of the fixed cost credits allocated to sellers servicing transportation customers provided service under SC No. 17 – Core Transportation and Swing Service, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### **Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0163SA2)

### NOTICE OF ADOPTION

**Allowing the Village's Filing to Increase Its Annual Revenue Requirement by \$231,254 or 15% in PSC No. 1 to Become Effective**

**I.D. No.** PSC-35-14-00007-A

**Filing Date:** 2014-12-11

**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of the Village of Little Valley Electric Department (the Village) to increase its annual revenue requirement increase by \$231,254 or 15% in PSC No. 1 — Electricity, to become effective.

**Statutory authority:** Public Service Law, section 66(12)(b)

**Subject:** Allowing the Village's filing to increase its annual revenue requirement by \$231,254 or 15% in PSC No. 1 to become effective.

**Purpose:** To allow the Village's filing to increase its annual revenue requirement by \$231,254 or 15% in PSC No. 1 to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing the Village of Little Valley Electric Department's filing, to increase its annual revenue requirement by \$231,254 or 15% in PSC No. 1 — Electricity, to become effective, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### **Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0363SA1)

### NOTICE OF ADOPTION

**Approving Binghamton BOP's Petition Granting a CPCN and a Lightened Regulatory Regime**

**I.D. No.** PSC-37-14-00008-A

**Filing Date:** 2014-12-11

**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order approving Binghamton BOP, LLC's (Binghamton BOP) petition granting a Certificate of Public Convenience and Necessity (CPCN) and a lightened regulatory regime.

**Statutory authority:** Public Service Law, sections 2(2-a), (13), 5(1)(b), 64-69, 69-a, 70, 71, 72, 72-a, 105-114, 114-a, 115, 117, 118, 119-b and 119-c

**Subject:** Approving Binghamton BOP's petition granting a CPCN and a lightened regulatory regime.

**Purpose:** To approve Binghamton BOP's petition granting a CPCN and a lightened regulatory regime.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving Binghamton BOP, LLC's petition granting a Certificate of Public Convenience and Necessity and providing for lightened regulation of the Binghamton Cogeneration Plant, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### **Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0372SA1)

### NOTICE OF ADOPTION

**Approving Saratoga Water's Petition to Finance Up to \$175,000 in Long Term Debt**

**I.D. No.** PSC-38-14-00011-A

**Filing Date:** 2014-12-15

**Effective Date:** 2014-12-15

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order approving the petition of Saratoga Water Services, Inc. (Saratoga Water) to issue and sell long-term debt in an amount not to exceed \$175,000.

**Statutory authority:** Public Service Law, sections 89-b, 89-c and 89-f

**Subject:** Approving Saratoga Water's petition to finance up to \$175,000 in long term debt.

**Purpose:** To approve Saratoga Water's petition to finance up to \$175,000 in long term debt.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving Saratoga Water Services, Inc.'s petition to issue and sell long term debt in the amount not to exceed \$175,000 to finance the extension of water service to Malta Commons Park, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### **Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-W-0486SA2)

## NOTICE OF ADOPTION

**Allowing RG&E's Filing to Modify the Denominator Used in the Calculation of the Gas Supply Charge to Become Effective****I.D. No.** PSC-38-14-00014-A**Filing Date:** 2014-12-11**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of Rochester Gas and Electric Corporation (RG&E) to modify the denominator used in the calculation of the Gas Supply Charge in PSC 16 — Gas, to become effective.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Allowing RG&E's filing to modify the denominator used in the calculation of the Gas Supply Charge to become effective.

**Purpose:** To allow RG&E's filing to modify the denominator used in the calculation of the Gas Supply Charge to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing Rochester Gas and Electric Corporation's filing to modify the denominator used in the calculation of the Gas Supply Charge to become effective.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0379SA1)

## NOTICE OF ADOPTION

**Approving TRP Associates Petition to Acquire Up to 20 Percent of the Common Stock of FirstEnergy Corp****I.D. No.** PSC-38-14-00015-A**Filing Date:** 2014-12-12**Effective Date:** 2014-12-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order approving T. Rowe Price Associates, Inc.'s (TRP Associates) petition to acquire up to 20 percent of the common stock of FirstEnergy Corp. and other related relief.

**Statutory authority:** Public Service Law, sections 65, 66 and 70

**Subject:** Approving TRP Associates petition to acquire up to 20 percent of the common stock of FirstEnergy Corp.

**Purpose:** To approve to acquire up to 20 percent of the common stock of FirstEnergy Corp. and other related relief.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order approving a petition filed by T. Rowe Price Associates, Inc. authorizing the acquisition of no more than twenty percent (20%) of the voting securities of FirstEnergy Corporation, confirmation that it will not become an electric corporation as defined in Public Service Law Section 2(13) as a result of such acquisition and a waiver of certain regulations pertaining to financial disclosure, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0384SA1)

## NOTICE OF ADOPTION

**Allowing NMPC's Filing to Clarify the Definitions and Provisions Related to SC No. 8 — Gas, in PSC No. 219 to Become Effective****I.D. No.** PSC-38-14-00017-A**Filing Date:** 2014-12-11**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC allowed the filing of Niagara Mohawk Power Corporation d/b/a National Grid (NMPC) to clarify the definitions and provisions related to Service Classification (SC) No. 8 — Gas, in PSC No. 219, to become effective.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Allowing NMPC's filing to clarify the definitions and provisions related to SC No. 8 — Gas, in PSC No. 219 to become effective.

**Purpose:** To allow NMPC's filing to clarify the definitions and provisions related to SC No. 8 — Gas, in PSC No. 219 to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, allowed Niagara Mohawk Power Corporation d/b/a National Grid's filing, to clarify the definitions and provisions related to Service Classification (SC) No. 8 — Gas Transportation Service with Standby Sales Service in PSC No. 219, to become effective.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0400SA1)

## NOTICE OF ADOPTION

**Allowing O&R's Filing to Make Revisions to the Description of Its Market Supply Charge to Become Effective****I.D. No.** PSC-40-14-00012-A**Filing Date:** 2014-12-11**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of Orange and Rockland Utilities, Inc. (O&R) to make revisions to the description of its Market Supply Charge for capacity related costs, in PSC No. 3 — Electricity, to become effective.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Allowing O&R's filing to make revisions to the description of its Market Supply Charge to become effective.

**Purpose:** To allow O&R's filing to make revisions to the description of its Market Supply Charge to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing Orange and Rockland Utilities, Inc.'s (O&R) filing to revise its description of the Market Supply Charge for capacity related costs, contained in PSC No. 3, to reflect the establishment of the New York Independent System Operator's new capacity zone, to become effective, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0420SA1)

**NOTICE OF ADOPTION****Allowing Niagara Mohawk's Filing to Revise the Calculation of Its MFC to Become Effective****I.D. No.** PSC-41-14-00008-A**Filing Date:** 2014-12-11**Effective Date:** 2014-12-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 12/11/14, the PSC adopted an order allowing the filing of Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) to revise the calculation of its Merchant Function Charge (MFC), contained in PSC Nos. 220 and 214, to become effective.

**Statutory authority:** Public Service Law, section 66(12)(b)

**Subject:** Allowing Niagara Mohawk's filing to revise the calculation of its MFC to become effective.

**Purpose:** To allow Niagara Mohawk's filing to revise the calculation of its MFC to become effective.

**Substance of final rule:** The Commission, on December 11, 2014, adopted an order allowing Niagara Mohawk Power Corporation d/b/a National Grid, to revise the calculation of its Merchant Function Charge included in Rule 42, contained in PSC Nos. 220 and 214 — Electricity, to become effective.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0437SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Petition for a Waiver to Master Meter Electricity****I.D. No.** PSC-52-14-00019-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition of 614 South Crouse Avenue, LLC for authority to master meter electricity at 614 South Crouse Avenue, Syracuse, New York.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65 and 66

**Subject:** Petition for a waiver to master meter electricity.

**Purpose:** Considering the request of 614 South Crouse Avenue, LLC to master meter electricity at 614 South Crouse Avenue, Syracuse, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition of 614 South Crouse Avenue, LLC, for a waiver of the individual residential unit metering requirements in Opinion 76-17 and National Grid Tariff P.S.C. No. 220 (electricity), and approval to master meter electricity at 614 South Crouse Avenue, Syracuse, New York, located in the territory of Niagara Mohawk Power Corporation, and to take any other actions necessary to address the petition.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0474SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****New York State Reliability Council's Establishment of an Installed Reserve Margin of 17.0%****I.D. No.** PSC-52-14-00020-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin of 17.0% established by the New York State Reliability Council for the Capability Year beginning May 1, 2015, and ending April 30, 2016.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

**Subject:** New York State Reliability Council's establishment of an Installed Reserve Margin of 17.0%.

**Purpose:** To adopt an Installed Reserve Margin for the Capability Year beginning May 1, 2015, and ending April 30, 2016.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin (IRM) of 17.0% established by the New York State Reliability Council's Executive Committee on December 5, 2014, for the Capability Year beginning May 1, 2015, and ending April 30, 2016. The IRM is based on the Technical Study Report dated December 5, 2014, and entitled "New York Control Area Installed Capacity Requirement for the Period May 2015 to April 2016," which was filed with the Commission on December 11, 2014.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [Secretary@dps.ny.gov](mailto:Secretary@dps.ny.gov)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0088SP9)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Requirements and Conditions for the Net Metering of Customer-Sited Generation Facilities****I.D. No.** PSC-52-14-00021-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering requirements and conditions for the net metering of customer-sited generation facilities as described in an Order issued December 16, 2014 in Cases 14-E-0422 and 14-E-0151.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Requirements and conditions for the net metering of customer-sited generation facilities.

**Purpose:** To consider requirements and conditions for the net metering of customer-sited generation facilities.

**Substance of proposed rule:** The Public Service Commission is considering the requirements, conditions and practices for the net metering of customer-sited generation facilities as described in the Order Raising Net Metering Caps, Requiring Tariff Revisions, Making Other Findings and Established Further Procedures issued December 16, 2014 in Cases 14-E-0422 and 14-E-0151. The Commission may adopt, reject or modify, in whole or in part, requirements, conditions and practices related to net metering and may resolve related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0422SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Petition for Submetering of Electricity**

**I.D. No.** PSC-52-14-00022-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Kingsview Homes, Inc. to submeter electricity at 125 Ashland Place, Brooklyn, New York.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for submetering of electricity.

**Purpose:** To consider the request of Kingsview Homes, Inc. to submeter electricity at 125 Ashland Place, Brooklyn, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Kingsview Homes, Inc. to submeter electricity at 125 Ashland Place, Brooklyn, New York, located in the territory of Consolidated Edison Company, Inc., and to take other actions necessary to address the petition.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-E-0522SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**LDC Inspection and Remediation Plans for Plastic Fusions**

**I.D. No.** PSC-52-14-00023-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission will decide whether to require Consolidated Edison (Con Ed) and Orange & Rockland utilities (ORU) to follow their plastic fusion inspection and remediation plans addressing safety risks submitted in Case 14-G-0212.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** LDC inspection and remediation plans for plastic fusions.

**Purpose:** Whether to order Con Ed and ORU to comply with their filed plans that address any safety risks associated with plastic fusions.

**Substance of proposed rule:** On June 27, 2014, the Commission issued two orders in Case 14-G-0212 - Proceeding on the Motion of the Commission to Investigate the Practices of Qualifying Persons to Perform Plastic Fusions on Natural Gas Facilities. One order was directed at Consolidated Edison of New York's (CECONY) (Order Instituting Proceeding to Investigate Consolidated Edison Company of New York, Inc.'s Practices and Obtain Information Concerning Plastic Fusions on Natural Gas Facilities). The other order was directed at the other local gas distribution companies LDCs in New York State (Order Investigating the Practices and Obtaining Information Concerning Plastic Fusions on Natural Gas Facilities). In both Orders, ordering clause 8 addressed the safety risk of plastic fusions performed by employees and contractors who were not qualified to perform plastic fusion in accordance with 16 NYCRR Part 255. For CECONY the ordering clause requested explanation of how CECONY would ensure the period of non-compliance did not result in defective fusions or other adverse consequences.

The responses by CECONY and the other LDCs did not fully address the risks. Therefore, a letter, dated September 29, 2014, was sent to all LDCs from the Chief of Gas Safety requesting each LDC to submit a remediation plan that fully addresses the risks. The letter specified eleven requirements for the plans, the plastic fusions to be considered, and the basis upon which utility personnel are considered non-qualified.

CECONY and Orange & Rockland Utilities, Inc. have submitted two remediation plans. Those LDCs not submitting a plan made the determination that they had no plastic fusions requiring a remediation plan.

The Commission is considering whether to order compliance with, reject, or modify the remediation plans submitted by CECONY and ORU.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0212SP2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Distributed Generation (DG), Natural Gas Vehicle (NGV) and Prime-WNY Programs**

**I.D. No.** PSC-52-14-00024-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering a proposal filed by National Fuel Gas Distribution Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service, P.S.C. No. 8—Gas.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Distributed Generation (DG), Natural Gas Vehicle (NGV) and Prime-WNY programs.

**Purpose:** To extend the DG and NGV programs to March 31, 2018 and for authorization of the Prime-WNY program.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by National Fuel Gas Distribution Corporation (the Company) to extend the Distributed Generation (DG) and Natural Gas Vehicle (NGV)

programs to March 31, 2018. The Company is also seeking authorization of the Partnership to Revitalize the Industrial Manufacturing Economy of Western New York (Prime-WNY), a program with similar features to the DG and NGV programs. Under the Prime-WNY program, the Company would be permitted to buy down the initial capital cost of system improvements, house piping, or customer gas fired equipment for qualifying customers. The customer would compensate the Company for the amount of the capital cost buy down through the incremental revenues derived from the customer's transportation service contract with the Company. The Company would enter into a contractual arrangement with the customer to recover any amount of the buy down above revenues generated by the tariff rate. The proposed filing has an effective date of April 1, 2015.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-G-0551SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Whether to Approve, Modify or Reject in Whole or in Part an Increase in Annual Revenues of Approximately \$24,000 or 48%**

**I.D. No.** PSC-52-14-00025-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Public Service Commission is considering a tariff filing by Windemere Highlands, Inc. to increase its annual revenues by approximately \$24,000, or 48%, to become effective April 1, 2015.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10)(a), (b), (e) and (f)

**Subject:** Whether to approve, modify or reject in whole or in part an increase in annual revenues of approximately \$24,000 or 48%.

**Purpose:** Whether to approve, modify or reject in whole or in part an increase in annual revenues of approximately \$24,000 or 48%.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Windemere Highlands, Inc. to amend its tariff schedule P.S.C. No. 1 – Water, to increase its annual revenues by approximately \$24,000, or 48%. The Company is also proposing to eliminate the charges for 3/4-inch and 1-inch meters from its tariff. In addition, the Company is requesting authority to collect a quarterly surcharge (Escrow Statement No. 1) of \$10.00 to be assessed on each customer's bill for four consecutive quarters to build an emergency escrow fund, capped at \$5,600. This fund would be available to cover the costs of unforeseen emergency repairs and capital improvements. The tariff amendments have an effective date of April 1, 2015. The Commission may consider any related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-W-0552SP1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Community Choice Aggregation**

**I.D. No.** PSC-52-14-00026-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering Community Choice Aggregation, as described in the Order Initiating Proceeding and Soliciting Comments issued December 16, 2014.

**Statutory authority:** Public Service Law, sections 5(1)-(2), 65(1)-(3), 66(1)-(3) and (5)

**Subject:** Community Choice Aggregation.

**Purpose:** To consider action related to Community Choice Aggregation.

**Substance of proposed rule:** The Public Service Commission is considering taking action to enable Community Choice Aggregation (CCA) in New York State, as described in the Order Initiating Proceeding and Soliciting Comments issued December 16, 2014 in Case 14-M-0224. The Order and the Staff White Paper attached to the Order provide further detail on CCA and on what actions could be undertaken to enable CCA. The Commission may adopt, reject or modify, in whole or in part, practices affecting CCA, including provisions of the Uniform Business Practices, and may resolve related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(14-M-0224SP1)

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## Department of State

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### NOTICE OF ADOPTION

**State Energy Conservation Construction Code (Energy Code)**

**I.D. No.** DOS-24-14-00002-A

**Filing No.** 1068

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Part 1240; and addition of new Part 1240 to Title 19 NYCRR.

**Statutory authority:** Energy Law, section 11-103

**Subject:** State Energy Conservation Construction Code (Energy Code).

**Purpose:** To repeal existing provisions of the Energy Code and adopt new provisions so as to reduce energy use in commercial buildings.

**Substance of final rule:** Article 11 of the Energy Law provides for adoption of a State Energy Conservation Construction Code by the State Fire Prevention and Building Code Council. Such code shall protect the health, safety and security of the people of the State of New York, assure a continuing supply of energy for future generations, and mandate that economically reasonable energy conservation techniques be used in the design and construction of all public and private buildings in New York.

The rule making repeals 19 NYCRR Part 1240 which currently establishes the provisions of the State Energy Conservation Construction Code and replaces it with a new Part 1240 which provides for a distinction between those energy code provisions applicable to residential buildings and those applicable to commercial buildings. The revised code provisions for commercial buildings meet or exceed the requirements of the 2010 edition of the publication entitled ANSI/ASHRAE/IES Standard 90.1: Energy Standards for Buildings Except Low-Rise Residential Buildings (ASHRAE 90.1-2010).

Section 1240.1 of new Part 1240 states that provisions of Part 1240 along with publications incorporated by reference therein shall constitute the State Energy Conservation Construction Code. Section 1240.2 sets forth definitions for certain terms used in the text of the regulation.

Section 1240.3 establishes the energy code provisions that shall be applicable to residential buildings. The construction of all new residential buildings, of all additions to, alterations of, and/or renovations of existing residential buildings, and of all additions to, alterations of, and/or renovations of building systems in existing residential buildings shall comply with the requirements of Chapters 1, 2, 3, 4, and 6 of the publication entitled Energy Conservation Construction Code of New York State, publication date August 2010 (2010 ECCCNY), provided however that such chapters of the 2010 ECCCNY shall be deemed to be amended to the extent set forth in Chapter 1 of the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code (the 2014 Supplement). The 2010 ECCCNY, the 2014 Supplement and certain codes and standards denoted in Chapter 6 of the 2010 ECCCNY are incorporated by reference to be part of the new Part 1240 text.

Section 1240.4 establishes the energy code provisions that shall be applicable to commercial buildings. The construction of all new commercial buildings, of all additions to, alterations of, and/or renovations of existing commercial buildings, and of all additions to, alterations of, and/or renovations of building systems in existing commercial buildings shall comply with the requirements of Chapter 1 of the 2010 ECCCNY and Chapters C2, C3, and C4 of the Commercial Provisions portion of the publication entitled 2012 International Energy Conservation Code published by the International Code Council, Inc. (2012 IECC). As with the energy code provisions applicable to residential buildings, certain provisions of the 2010 ECCCNY and the 2012 IECC shall be deemed to be amended in the manner set forth in applicable chapters of the 2014 Supplement. To the extent provided in the Commercial Provisions portion of the 2012 IECC, compliance with the requirements of the publication entitled Energy Standard for Buildings Except Low-Rise Residential Buildings, standard reference number 90.1-2010, published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE 90.1-2010) shall be permitted in lieu of compliance with specified sections of the 2012 IECC. However, certain provisions of ASHRAE 90.1-2010 shall be deemed to be amended in the manner specified in Chapter 3 of the 2014 Supplement. Chapter 1 of the 2010 ECCCNY, Chapters C2, C3 and C4 of the Commercial Provisions portion of the 2012 IECC, the 2014 Supplement, ASHRAE 90.1-2010, and certain codes and standards denoted in Chapter 4 of the 2014 Supplement are incorporated by reference to be a part of the text of the new Part 1240.

Section 1240.5 specifies that provisions of the State Energy Conservation Construction Code shall not apply to the alteration or renovation of an historic building. In addition, the code shall not apply to certain listed alterations of existing buildings provided such alteration will not increase the energy usage of the building.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 1240.2(c), (d), 1240.3(a), 1240.4(a)(1) and (2).

**Text of rule and any required statements and analyses may be obtained from:** Mark Blanke, Department of State, Division of Building Standards and Code, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Mark.Blanke@dos.ny.gov

#### Revised Regulatory Impact Statement

Changes made to the rule text since publication of the Notice of Proposed Rule Making are described below. These changes do not affect the issues addressed in the Regulatory Impact Statement and, therefore, a Revised Regulatory Impact Statement is not required.

The text of 19 NYCRR Part 1240 originally proposed for addition to the Official Compilation of Codes, Rules and Regulations of the State of New York has been changed to clarify or correct the publication dates of two of the documents that will be incorporated by reference into Part 1240. Non-substantive changes have been made to the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code ("2014 Supplement"). The revised version is dated November 2014. Sections 1240.2 (d), 1240.3(a) and 1240.4(a)(1) of 19 NYCRR Part 1240 were changed to provide for incorporation by reference of the 2014 Supplement, publication date November 2014, into 19 NYCRR Part 1240. Errata contained within the publication entitled 2012 International Energy

Conservation Code (2012 IECC") has periodically been corrected by its publisher International Code Council, Inc. and incorporated into subsequent printings of such publication. Sections 1240.2(c) and 1240.4(a)(2) of 19 NYCRR Part 1240 were changed to clarify that it is the Fourth Printing, publication date October 2013 of the 2012 IECC that is incorporated by reference into Part 1240.

The 2012 IECC and portions of the publication entitled Energy Conservation Construction Code of New York State ("2010 ECCCNY") are incorporated by reference into 19 NYCRR Part 1240 to the extent that such publications are deemed to be amended by the provisions of the 2014 Supplement. Subsequent to publication of the Notice of Proposed Rule Making, the following non-substantive changes have been made to provisions of the 2014 Supplement which direct that certain portions of the 2010 ECCCNY and the 2012 IECC be deemed amended for incorporation as part of the New York State Energy Conservation Construction Code.

Changes to Chapter 1, Amendments to the 2010 ECCCNY:

a. Paragraph 2, Section 101.1 Titles: The sentence "The 2012 International Energy Code shall be known as the 2012 IECC" is changed to read "The 2012 Fourth Printing of the International Energy Code shall be known as the "2012 IECC"" to clarify that the latest available printing of the 2012 IECC including all ICC corrections of errata to date, is the document referenced by the 2012 ECCCNY.

b. Paragraph 4 Section 101.3.1 Federal Standards: The Section is amended to add the following text behind the last sentence of Section 101.3.1 "Applicability of the terms Residential and Commercial for the application of this code, shall be in accordance with the definitions found in Paragraph 15 of this Chapter." This change provides clarification to code users for the applicability of the terms Residential and Commercial, in appropriate sections of the Energy Code.

Changes to Chapter 2, Amendments to the 2012 IECC:

a. Chapter 2, Paragraph 1, 2012 IECC Section C202 (General Definitions): The definition 2014 Supplement is amended to read as follows:

2014 SUPPLEMENT. The publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code published by the New York State Department of State (Published November 7, 2014)

b. Chapter 2, paragraph 14, IECC 2012 Section C403.2.3.1 is corrected to read as follows:

C403.2.3.1 Water-cooled centrifugal chilling packages. Equipment not designed for operation at AHRI Standard 550/590 test conditions of 44°F (7°C) leaving chilled-water temperature and 85°F (29°C) entering condenser water temperature with 3 gpm/ton (0.054 l/s • kW) condenser water flow shall have maximum full-load kW/ton and NPLV ratings adjusted using the equations specified in Section 6.4.1.2.1 of ASHRAE 90.1 2010.

c. Chapter 2, Paragraph 21, 2012 IECC Section C403.3.1 (Economizers) Table 403.3.1 footnote (2) is corrected to read as follows:

(2) the energy efficiency of the HVAC unit is not rated with any "part load" metric but is rated with a "full load" metric (such as EER or COP); Tables C403.2.3 (1) though C403.2. (8) specify a required minimum cooling efficiency for such HVAC unit using the same "full load" metric; and the rated efficiency of the HVAC unit exceeds the required minimum efficiency (expressed in the same "full load" metric) by at least the percentage shown in this Table.

d. Chapter 2, Paragraph 27, 2012 IECC Section C403.4.5 (Requirements for mechanical systems serving multiple zones): The second paragraph of Section C403.4.5 is amended to read:

Sections C403.4.5.1 through C403.4.5.5 shall apply to complex mechanical systems serving multiple zones. Supply air systems serving multiple zones shall be VAV systems which, during periods of occupancy, are designed and capable of being controlled to reduce primary air supply to each zone to one of the following before reheating, recooling or mixing takes place:

e. Chapter 2, Paragraph 29, 2012 IECC Section C403.4.5.5 Multiple-zone VAV system ventilation optimization: Section C403.4.5.5 is amended to read:

C403.4.5.5 Multiple-zone VAV system ventilation optimization control. Multiple-zone VAV systems with DDC of individual zone boxes reporting to a central control panel shall have automatic controls configured to reduce outdoor air intake flow below design rates in response to changes in system ventilation efficiency (Ev) as defined by ASHRAE 90.1, Section 6.5.3.3

f. Chapter 2, Paragraph 38, 2012 IECC Table C406.2.(4) is amended to read as follows; Warm air furnaces and Combination warm air furnaces /Air conditioning units, Warm air duct furnaces and unit heaters, efficiency requirements.

Reason for the changes: To provide typographical correction.

g. Paragraph 1, 2012 IECC Section C202 (General Definitions)

i. The definition of the term "Building Thermal Envelope" is amended to read as follows:

The exterior walls (above and below grade), floor, roof and any other building elements that enclose conditioned space, or provides a boundary between conditioned space and exempt or unconditioned space.

The term "Basement wall" is removed from the definition of "Building thermal envelope."

ii. The definition of the term "Below Grade walls" is added to read as follows: "BELOW GRADE WALLS. Below grade walls are basement or first story walls associated with the exterior of the building that are at least 85 percent below grade."

Reason for the change: To provide further coordination with the ICC errata, and the Fourth printing of the IECC 2012.

h. Chapter 2, Paragraph 30, 2012 IECC Section C405.1 Electrical power and lighting systems (Mandatory):

i. Amend Section C405.1 to read "C405.1 Electrical power and lighting systems (Mandatory).

Exception. Dwelling units within commercial buildings shall not be required to comply with Sections C405.2 through C405.5 provided that a minimum of 75 percent of the lamps in permanently installed lighting fixtures, other than low voltage lighting, be high-efficacy lamps, or a minimum of 75 percent of the permanently installed lighting fixtures contain only high efficacy lamps.

Reason for the change: To provide further clarification of the code section.

i. Chapter 2, Paragraph 32, 2012 IECC Section C405.3 Tandem wiring (Mandatory)

Delete Section C405.3 in its entirety.

Reason for the change: Eliminates outdated technology which is no longer relevant.

j. Chapter 2, Paragraph 33, 2012 IECC Section C405.5.1.2 Low-voltage lighting:

Delete Section C405.5.1.2 in its entirety. This section is moved to C405.5.1.4

Reason for the change: Moves the code requirement to a more relevant section.

k. Chapter 2, Paragraph 34, 2012 IECC Section C405.5.1.3 Other luminaires

Amend Section C405.5.1.3 to read "Section C405.5.1.3 Other luminaires. The wattage of all other lighting equipment including luminaires with integral or remote ballasts, transformers, or similar devices shall be the wattage of the lighting equipment verified through data furnished by the manufacturer or other approved sources."

Reason for the change: Provides further clarification for assessment of allowable wattage by indicating power sources to be considered in specialized lighting applications.

l. Chapter 2, Paragraph 35, 2012 IECC Section C405.5.1.4 Line voltage track and plug-in busway:

Amend Section C405.5.1.4 to read "C405.5.1.4 Line voltage. Lighting track and plug-in busway. The wattage shall be:

1. The specified wattage of the luminaires included in the system with a minimum of 30W/lin.ft; or
2. The wattage limit of the system's circuit breaker; or
3. The wattage limit of other permanent current limiting devices(s) on the system; or
4. For low voltage systems, the maximum wattage of the transformer supplying the system.

Reason for the change: Moves the code requirement to a more relevant section.

m. Chapter 2, Paragraph 36, 2012 IECC Section C405.6 Exterior lighting (Mandatory):

Amend Section C405.6 to read "C405.6 Exterior lighting (Mandatory) Where the power for exterior lighting is supplied through the energy service to the building, all exterior lighting, shall comply with Section C405.6.2

n. Chapter 2, Paragraph 37, 2012 IECC Section C405.6.1 Exterior building grounds lighting:

Delete Section C405.6.1 in its entirety.

Reason for the change: The modification is a minor change to the code section, and was accepted in the Final Action agenda of the IECC 2013 code cycle. The modification simplifies the code text without reducing (without modifying) stringency. The exemption for "low-voltage landscape lighting" adds unnecessary complexity. This exemption is not in Standard ASHRAE 90.1-2010

#### Revised Regulatory Flexibility Analysis

Changes made to the rule text since publication of the Notice of Proposed Rule Making are described below. These changes do not affect the issues addressed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and, therefore, a Revised Regulatory Flexibility Analysis is not required.

The text of 19 NYCRR Part 1240 originally proposed for addition to the Official Compilation of Codes, Rules and Regulations of the State of

New York has been changed to clarify or correct the publication dates of two of the documents that will be incorporated by reference into Part 1240. Non-substantive changes have been made to the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code ("2014 Supplement"). The revised version is dated November 2014. Sections 1240.2 (d), 1240.3(a) and 1240.4(a)(1) of 19 NYCRR Part 1240 were changed to provide for incorporation by reference of the 2014 Supplement, publication date November 2014, into 19 NYCRR Part 1240. Errata contained within the publication entitled 2012 International Energy Conservation Code (2012 IECC") has periodically been corrected by its publisher International Code Council, Inc. and incorporated into subsequent printings of such publication. Sections 1240.2(c) and 1240.4(a)(2) of 19 NYCRR Part 1240 were changed to clarify that it is the Fourth Printing, publication date October 2013 of the 2012 IECC that is incorporated by reference into Part 1240.

The 2012 IECC and portions of the publication entitled Energy Conservation Construction Code of New York State ("2010 ECCCNYs") are incorporated by reference into 19 NYCRR Part 1240 to the extent that such publications are deemed to be amended by the provisions of the 2014 Supplement. Subsequent to publication of the Notice of Proposed Rule Making, the following non-substantive changes have been made to provisions of the 2014 Supplement which direct that certain portions of the 2010 ECCCNYs and the 2012 IECC be deemed amended for incorporation as part of the New York State Energy Conservation Construction Code.

Changes to Chapter 1, Amendments to the 2010 ECCCNYs:

a. Paragraph 2, Section 101.1 Titles: The sentence "The 2012 International Energy Code shall be known as the 2012 IECC" is changed to read "The 2012 Fourth Printing of the International Energy Code shall be known as the "2012 IECC"" to clarify that the latest available printing of the 2012 IECC including all ICC corrections of errata to date, is the document referenced by the 2012 ECCCNYs.

b. Paragraph 4 Section 101.3.1 Federal Standards: The Section is amended to add the following text behind the last sentence of Section 101.3.1 "Applicability of the terms Residential and Commercial for the application of this code, shall be in accordance with the definitions found in Paragraph 15 of this Chapter." This change provides clarification to code users for the applicability of the terms Residential and Commercial, in appropriate sections of the Energy Code.

Changes to Chapter 2, Amendments to the 2012 IECC:

a. Chapter 2, Paragraph 1, 2012 IECC Section C202 (General Definitions): The definition 2014 Supplement is amended to read as follows:

2014 SUPPLEMENT. The publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code published by the New York State Department of State (Published November 7, 2014)

b. Chapter 2, paragraph 14, IECC 2012 Section C403.2.3.1 is corrected to read as follows:

C403.2.3.1 Water-cooled centrifugal chilling packages. Equipment not designed for operation at AHRI Standard 550/590 test conditions of 44°F (7°C) leaving chilled-water temperature and 85°F (29°C) entering condenser water temperature with 3 gpm/ton (0.054 l/s • kW) condenser water flow shall have maximum full-load kW/ton and NPLV ratings adjusted using the equations specified in Section 6.4.1.2.1 of ASHRAE 90.1 2010.

c. Chapter 2, Paragraph 21, 2012 IECC Section C403.3.1 (Economizers) Table 403.3.1 footnote (2) is corrected to read as follows:

(2) the energy efficiency of the HVAC unit is not rated with any "part load" metric but is rated with a "full load" metric (such as EER or COP); Tables C403.2.3 (1) though C403.2. (8) specify a required minimum cooling efficiency for such HVAC unit using the same "full load" metric; and the rated efficiency of the HVAC unit exceeds the required minimum efficiency (expressed in the same "full load" metric) by at least the percentage shown in this Table.

d. Chapter 2, Paragraph 27, 2012 IECC Section C403.4.5 (Requirements for mechanical systems serving multiple zones)): The second paragraph of Section C403.4.5 is amended to read:

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e. Chapter 2, Paragraph 29, 2012 IECC Section C403.4.5.5 Multiple-zone VAV system ventilation optimization: Section C403.4.5.5 is amended to read:

C403.4.5.5 Multiple-zone VAV system ventilation optimization control. Multiple-zone VAV systems with DDC of individual zone boxes reporting to a central control panel shall have automatic controls configured to reduce outdoor air intake flow below design rates in response to

changes in system ventilation efficiency (Ev) as defined by ASHRAE 90.1, Section 6.5.3.3

f. Chapter 2, Paragraph 38, 2012 IECC Table C406.2.(4) is amended to read as follows; Warm air furnaces and Combination warm air furnaces /Air conditioning units, Warm Warm air duct furnaces and unit heaters, efficiency requirements.

Reason for the changes: To provide typographical correction.

g. Paragraph 1, 2012 IECC Section C202 (General Definitions)

i. The definition of the term "Building Thermal Envelope" is amended to read as follows:

The exterior walls (above and below grade), floor, roof and any other building elements that enclose conditioned space, or provides a boundary between conditioned space and exempt or unconditioned space.

The term "Basement wall" is removed from the definition of "Building thermal envelope."

ii. The definition of the term "Below Grade walls" is added to read as follows: "BELOW GRADE WALLS. Below grade walls are basement or first story walls associated with the exterior of the building that are at least 85 percent below grade."

Reason for the change: To provide further coordination with the ICC errata, and the Fourth printing of the IECC 2012.

h. Chapter 2, Paragraph 30, 2012 IECC Section C405.1 Electrical power and lighting systems (Mandatory):

i. Amend Section C405.1 to read "C405.1 Electrical power and lighting systems (Mandatory)

Exception. Dwelling units within commercial buildings shall not be required to comply with Sections C405.2 through C405.5 provided that a minimum of 75 percent of the lamps in permanently installed lighting fixtures, other than low voltage lighting, be high-efficacy lamps, or a minimum of 75 percent of the permanently installed lighting fixtures contain only high efficacy lamps.

Reason for the change: To provide further clarification of the code section.

i. Chapter 2, Paragraph 32, 2012 IECC Section C405.3 Tandem wiring (Mandatory):

Delete Section C405.3 in its entirety.

Reason for the change: Eliminates outdated technology which is no longer relevant.

j. Chapter 2, Paragraph 33, 2012 IECC Section C405.5.1.2 Low-voltage lighting:

Delete Section C405.5.1.2 in its entirety. This section is moved to C405.5.1.4

Reason for the change: Moves the code requirement to a more relevant section.

k. Chapter 2, Paragraph 34, 2012 IECC Section C405.5.1.3 Other luminaires

Amend Section C405.5.1.3 to read "Section C405.5.1.3 Other luminaires. The wattage of all other lighting equipment including luminaires with integral or remote ballasts, transformers, or similar devices shall be the wattage of the lighting equipment verified through data furnished by the manufacturer or other approved sources."

Reason for the change: Provides further clarification for assessment of allowable wattage by indicating power sources to be considered in specialized lighting applications.

l. Chapter 2, Paragraph 35, 2012 IECC Section C405.5.1.4 Line voltage track and plug-in busway:

Amend Section C405.5.1.4 to read "C405.5.1.4 Line voltage. Lighting track and plug-in busway. The wattage shall be:

1. The specified wattage of the luminaires included in the system with a minimum of 30W/lin.ft; or

2. The wattage limit of the system's circuit breaker; or

3. The wattage limit of other permanent current limiting devices(s) on the system; or

4. For low voltage systems, the maximum wattage of the transformer supplying the system.

Reason for the change: Moves the code requirement to a more relevant section.

m. Chapter 2, Paragraph 36, 2012 IECC Section C405.6 Exterior lighting (Mandatory):

Amend Section C405.6 to read "C405.6 Exterior lighting (Mandatory) Where the power for exterior lighting is supplied through the energy service to the building, all exterior lighting, shall comply with Section C405.6.2.

n. Chapter 2, Paragraph 37, 2012 IECC Section C405.6.1 Exterior building grounds lighting:

Delete Section C405.6.1 in its entirety.

Reason for the change: The modification is a minor change to the code section, and was accepted in the Final Action agenda of the IECC 2013 code cycle. The modification simplifies the code text without reducing (without modifying) stringency. The exemption for "low-voltage land-

scape lighting" adds unnecessary complexity. This exemption is not in Standard ASHRAE 90.1-2010.

#### **Revised Rural Area Flexibility Analysis**

Changes made to the rule text since publication of the Notice of Proposed Rule Making are described below. These changes do not affect the issues addressed in the Rural Area Flexibility Analysis and, therefore, a Revised Rural Area Flexibility Analysis is not required.

The text of 19 NYCRR Part 1240 originally proposed for addition to the Official Compilation of Codes, Rules and Regulations of the State of New York has been changed to clarify or correct the publication dates of two of the documents that will be incorporated by reference into Part 1240. Non-substantive changes have been made to the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code ("2014 Supplement"). The revised version is dated November 2014. Sections 1240.2 (d), 1240.3(a) and 1240.4(a)(1) of 19 NYCRR Part 1240 were changed to provide for incorporation by reference of the 2014 Supplement, publication date November 2014, into 19 NYCRR Part 1240. Errata contained within the publication entitled 2012 International Energy Conservation Code (2012 IECC") has periodically been corrected by its publisher International Code Council, Inc. and incorporated into subsequent printings of such publication. Sections 1240.2(c) and 1240.4(a)(2) of 19 NYCRR Part 1240 were changed to clarify that it is the Fourth Printing, publication date October 2013 of the 2012 IECC that is incorporated by reference into Part 1240.

The 2012 IECC and portions of the publication entitled Energy Conservation Construction Code of New York State ("2010 ECCCNYS") are incorporated by reference into 19 NYCRR Part 1240 to the extent that such publications are deemed to be amended by the provisions of the 2014 Supplement. Subsequent to publication of the Notice of Proposed Rule Making, the following non-substantive changes have been made to provisions of the 2014 Supplement which direct that certain portions of the 2010 ECCCNYS and the 2012 IECC be deemed amended for incorporation as part of the New York State Energy Conservation Construction Code.

Changes to Chapter 1, Amendments to the 2010 ECCCNYS:

a. Paragraph 2, Section 101.1 Titles: The sentence "The 2012 International Energy Code shall be known as the 2012 IECC" is changed to read "The 2012 Fourth Printing of the International Energy Code shall be known as the "2012 IECC"" to clarify that the latest available printing of the 2012 IECC including all ICC corrections of errata to date, is the document referenced by the 2012 ECCCNYS.

b. Paragraph 4 Section 101.3.1 Federal Standards: The Section is amended to add the following text behind the last sentence of Section 101.3.1 "Applicability of the terms Residential and Commercial for the application of this code, shall be in accordance with the definitions found in Paragraph 15 of this Chapter." This change provides clarification to code users for the applicability of the terms Residential and Commercial, in appropriate sections of the Energy Code.

Changes to Chapter 2, Amendments to the 2012 IECC:

a. Chapter 2, Paragraph 1, 2012 IECC Section C202 (General Definitions): The definition 2014 Supplement is amended to read as follows:

2014 SUPPLEMENT. The publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code published by the New York State Department of State (Published November 7, 2014)

b. Chapter 2, paragraph 14, IECC 2012 Section C403.2.3.1 is corrected to read as follows:

C403.2.3.1 Water-cooled centrifugal chilling packages. Equipment not designed for operation at AHRI Standard 550/590 test conditions of 44°F (7°C) leaving chilled-water temperature and 85°F (29°C) entering condenser water temperature with 3 gpm/ton (0.054 l/s • kW) condenser water flow shall have maximum full-load kW/ton and NPLV ratings adjusted using the equations specified in Section 6.4.1.2.1 of ASHRAE 90.1 2010.

c. Chapter 2, Paragraph 21, 2012 IECC Section C403.3.1 (Economizers) Table 403.3.1 footnote (2) is corrected to read as follows:

(2) the energy efficiency of the HVAC unit is not rated with any "part load" metric but is rated with a "full load" metric (such as EER or COP); Tables C403.2.3 (1) through C403.2. (8) specify a required minimum cooling efficiency for such HVAC unit using the same "full load" metric; and the rated efficiency of the HVAC unit exceeds the required minimum efficiency (expressed in the same "full load" metric) by at least the percentage shown in this Table.

d. Chapter 2, Paragraph 27, 2012 IECC Section C403.4.5 (Requirements for mechanical systems serving multiple zones): The second paragraph of Section C403.4.5 is amended to read:

Sections C403.4.5.1 through C403.4.5.5 shall apply to complex mechanical systems serving multiple zones. Supply air systems serving multiple zones shall be VAV systems which, during periods of occupancy, are designed and capable of being controlled to reduce primary air supply

to each zone to one of the following before reheating, recooling or mixing takes place:

e. Chapter 2, Paragraph 29, 2012 IECC Section C403.4.5.5 Multiple-zone VAV system ventilation optimization: Section C403.4.5.5 is amended to read:

C403.4.5.5 Multiple-zone VAV system ventilation optimization control. Multiple-zone VAV systems with DDC of individual zone boxes reporting to a central control panel shall have automatic controls configured to reduce outdoor air intake flow below design rates in response to changes in system ventilation efficiency (Ev) as defined by ASHRAE 90.1, Section 6.5.3.3

f. Chapter 2, Paragraph 38, 2012 IECC Table C406.2.(4) is amended to read as follows; Warm air furnaces and Combination warm air furnaces /Air conditioning units, Warm Warm air duct furnaces and unit heaters, efficiency requirements.

Reason for the changes: To provide typographical correction.

g. Paragraph 1, 2012 IECC Section C202 (General Definitions)

i. The definition of the term "Building Thermal Envelope" is amended to read as follows:

The exterior walls (above and below grade), floor, roof and any other building elements that enclose conditioned space, or provides a boundary between conditioned space and exempt or unconditioned space.

The term "Basement wall" is removed from the definition of "Building thermal envelope."

ii. The definition of the term "Below Grade walls" is added to read as follows: "BELOW GRADE WALLS. Below grade walls are basement or first story walls associated with the exterior of the building that are at least 85 percent below grade."

Reason for the change: To provide further coordination with the ICC errata, and the Fourth printing of the IECC 2012.

h. Chapter 2, Paragraph 30, 2012 IECC Section C405.1 Electrical power and lighting systems (Mandatory):

i. Amend Section C405.1 to read "C405.1 Electrical power and lighting systems (Mandatory)

Exception. Dwelling units within commercial buildings shall not be required to comply with Sections C405.2 through C405.5 provided that a minimum of 75 percent of the lamps in permanently installed lighting fixtures, other than low voltage lighting, be high-efficacy lamps, or a minimum of 75 percent of the permanently installed lighting fixtures contain only high efficacy lamps.

Reason for the change: To provide further clarification of the code section.

i. Chapter 2, Paragraph 32, 2012 IECC Section C405.3 Tandem wiring (Mandatory):

Delete Section C405.3 in its entirety.

Reason for the change: Eliminates outdated technology which is no longer relevant.

j. Chapter 2, Paragraph 33, 2012 IECC Section C405.5.1.2 Low-voltage lighting:

Delete Section C405.5.1.2 in its entirety. This section is moved to C405.5.1.4

Reason for the change: Moves the code requirement to a more relevant section.

k. Chapter 2, Paragraph 34, 2012 IECC Section C405.5.1.3 Other luminaires

Amend Section C405.5.1.3 to read "Section C405.5.1.3 Other luminaires. The wattage of all other lighting equipment including luminaires with integral or remote ballasts, transformers, or similar devices shall be the wattage of the lighting equipment verified through data furnished by the manufacturer or other approved sources."

Reason for the change: Provides further clarification for assessment of allowable wattage by indicating power sources to be considered in specialized lighting applications.

l. Chapter 2, Paragraph 35, 2012 IECC Section C405.5.1.4 Line voltage track and plug-in busway:

Amend Section C405.5.1.4 to read "C405.5.1.4 Line voltage. Lighting track and plug-in busway. The wattage shall be:

1. The specified wattage of the luminaires included in the system with a minimum of 30W/lin.ft; or

2. The wattage limit of the system's circuit breaker; or

3. The wattage limit of other permanent current limiting devices(s) on the system; or

4. For low voltage systems, the maximum wattage of the transformer supplying the system.

Reason for the change: Moves the code requirement to a more relevant section.

m. Chapter 2, Paragraph 36, 2012 IECC Section C405.6 Exterior lighting (Mandatory):

Amend Section C405.6 to read "C405.6 Exterior lighting (Mandatory) Where the power for exterior lighting is supplied through the energy ser-

vice to the building, all exterior lighting, shall comply with Section C405.6.2

n. Chapter 2, Paragraph 37, 2012 IECC Section C405.6.1 Exterior building grounds lighting:

Delete Section C405.6.1 in its entirety.

Reason for the change: The modification is a minor change to the code section, and was accepted in the Final Action agenda of the IECC 2013 code cycle. The modification simplifies the code text without reducing (without modifying) stringency. The exemption for "low-voltage landscape lighting" adds unnecessary complexity. This exemption is not in Standard ASHRAE 90.1-2010

#### **Revised Job Impact Statement**

The Department of State has determined that it is apparent from the nature and purpose of the rule making that it will not have a substantial adverse impact on jobs and employment opportunities. The rule making will amend the State Energy Conservation Construction Code ("State Energy Code") by adopting a building energy code for commercial buildings which is based largely on (1) the 2012 edition of the International Energy Conservation Code (the "2012 IECC"), a model code developed and published by the International Code Council ("ICC"), and (2) the 2010 edition of ASHRAE-90.1 (the "2010 ASHRAE 90.1 Energy Standard for Buildings Except Low Rise Residential Buildings"), a standard published by the American Society Of Heating and Refrigeration and Air Conditioning Engineers.

Both the 2012 IECC and the 2010 ASHRAE 90.1 incorporate more current technology in the area of energy conservation. By implementing new technology in all areas of building construction, the overall effect is a potential for increased employment in the construction of a building. This is evidenced by increased initial costs in certain building types. Increases in building construction costs include (but are not limited to):

1.) Lighting systems; the installation of advanced controls for lighting systems, both interior and exterior lighting.

2.) Day lighting controls; which monitor the available sunlight to provide alternate interior building lighting.

3.) Building ventilation controls; which monitor need for ventilation air.

4.) Building air barriers; more detailed requirements for the installation of positive building air barriers, which potentially increase employment in the installation of a more positive air barrier, as well as the inspection of the same.

5.) Building mechanical systems commissioning and completion requirements; New code requirements for building mechanical systems commissioning, which requires the involvement of a registered design professional, or an approved agency, for the purpose of verifying and documenting the HVAC systems have been designed, installed and functioning according to project requirements, and minimum code requirements.

In addition, as a performance-based, rather than a prescriptive, code, the 2012 IECC provides for alternative methods of achieving code compliance, thereby allowing regulated parties to choose the most cost effective method. By using performance-based design, customized goals that may not have been anticipated by the building code, can be achieved while maintaining or exceeding the facility's required level of energy efficiency. This software approach is sometimes referred to as a "trade off approach" as it allows, for example, less insulation in one area when made up in another.

As a consequence, the Department of State and the State Fire Prevention and Building Code Council conclude that regulations based upon the 2012 IECC and the 2010 ASHRAE 90.1 will provide a greater efficiency incentive for the construction of new buildings and the rehabilitation of existing buildings than exists with the current State Energy Code. Therefore, this rule making will not have a substantial adverse impact on jobs and employment opportunities within New York. In fact, the contrary may be true, in that the revised State Energy Code may result in an increase in employment opportunities for those involved in the field of building technology. Each of the updated requirements for the incorporation of newer building technology have the potential to result in a need for increased engineering and inspection infrastructure which appear to positively impact New York State's job market.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The Department of State received several comments during the public comment period designated for this rulemaking. Although the Department received several comments asserting in general terms that, if adopted, the rule will result in increased construction costs for regulated parties, no comments received included any specific estimates of cost projections that

the rule will result in increased construction costs which differed significantly from those presented by the Department in the Regulatory Impact Statement, Regulatory Flexibility Analysis, or Rural Area Flexibility Analysis prepared for this rule making.

COMMENT: The 2014 Supplement to the New York State Energy Conservation Construction Code ("the Supplement") is not user friendly. A format of text strike out (text to be removed) and replacement (text to be added) would be more practical for the user.

RESPONSE: The Supplement provides modifications to several publications which will be incorporated by reference into the text of the newly adopted regulation. In developing the format of the Supplement, different formats were considered. A decision was made that the most appropriate format would be to restate the entire code section as it will appear for regulated parties.

COMMENT: Is Chapter 5 of the 2010 Energy Conservation Construction Code of New York State ("2010 ECCCNY") being eliminated?

RESPONSE: Chapter 5 of the publication 2010 ECCCNY will not be incorporated by reference as part of the text of the revised State Energy Conservation Construction Code ("Energy Code"). Chapter 5 will be replaced by Chapter C4 of the publication 2012 International Energy Conservation Code ("2012 IECC") which will be incorporated by reference to be part of the Energy Code.

COMMENT: There is confusion in Chapter 1 of the Supplement when referring to "the New York State Residential Energy Code", "the New York State Commercial Energy Code, and the New York State Energy Code".

RESPONSE: The Supplement's Introductory statement explains the differences between the documents stating which portions of the publication 2010 ECCCNY will continue to be incorporated by reference to remain a part of a revised Energy Code and which other documents will also be incorporated by reference so as to be part of a revised Energy Code.

COMMENT: Are the exceptions noted in the publication 2010 ECCCNY regarding Additions, Alterations and Renovations to remain a part of the revised Energy Code?

RESPONSE: Chapter 1 (Administrative provisions) of the 2010 ECCCNY, as deemed to be amended by provisions of The Supplement, will be incorporated by reference to be a part of a revised Energy Code.

COMMENT: Several definitions are replicated in subsequent chapters of The Supplement.

RESPONSE: Chapter 1 of The Supplement pertains to residential construction while Chapter 2 pertains to commercial construction. The definitions established for residential construction may have different meanings when applied to commercial construction.

COMMENT: Are any of the referenced standards modified by The Supplement standards which are referenced by the 2010 ECCCNY?

RESPONSE: The Supplement only modifies referenced standards listed in the 2012 IECC. Referenced standards listed in the 2010 ECCCNY are not modified by the Supplement.

COMMENT: It seems we are losing prescriptive design to performance design.

RESPONSE: Prescriptive design is still a valid design methodology, and is unaffected by the addition of a performance alternate. Prescriptive design will not be lessened by the revised Energy Code.

COMMENT: If the proposed provisions of The Supplement regarding commercial construction are implemented, New York State will be in violation of federal law.

RESPONSE: That is not an accurate assessment. The Department of State is acutely aware of the requirements of the Federal Energy Conservation and Production Act (EPCA) mandate, (i.e. to adopt an Energy Code at least as restrictive as the most current version of ASHRAE 90.1) and has accordingly taken steps to assure that New York State is not out of compliance with EPCA.

COMMENT: The Supplement describes conflict resolution between Residential Chapters of the 2010 ECCCNY and its referenced standards, but is silent on conflicts involving Commercial Chapters of the code.

RESPONSE: Chapter 1 of the Supplement describes conflict resolution within the 2010 ECCCNY as applied to Residential requirements. Chapters 2 and 3 of the Supplement specifically address commercial provision modifications of the 2012 IECC and commercial referenced standards of the 2012 IECC, eliminating potential conflict between the two within the Supplement. Secondly, the official Text of Rule Part 1240 also addresses the subject of potential conflict between Chapters of 2012 IECC and its referenced standards.

COMMENT: There are several typographical errors in The Supplement.

RESPONSE: Typographical errors will be corrected.

COMMENT: The International Code Council (ICC) has published errata to identify several corrections to the text of the 2012 2012 IECC. Will these errata be included as part of the revised Energy Code?

RESPONSE: Yes, the Fourth Printing of the 2012 IECC is the version which will be incorporated by reference to be a part of the revised Energy Code. All errata issued by the ICC to date are incorporated.

COMMENT: The Supplement would reclassify provisions in the 2012 IECC from "mandatory" to "prescriptive" provisions. The provisions are 2012 IECC Section C403.2.6 (Energy recovery ventilation systems) and C403.2.10 (Air system design and control). This would weaken the overall impact of the Energy Code.

RESPONSE: The designation of these sections are being changed to mirror requirements of ASHRAE 90.1-2010. The ASHRAE 90.1 standard is the basis for the commercial construction provisions of the revised Energy Code which is the reason for this modification. The related code sections will be adjusted accordingly.

COMMENT: 2012 IECC, Chapter C4, Mechanical equipment threshold cooling capacity below which no economizer is required will be raised from 33,000 (British Thermal Units) Btu/h to 54,000 (British Thermal Units) Btu/h, lowering the stringency of the Code".

RESPONSE: The 2012 IECC baseline of 33,000 Btu/hr is an extremely low threshold, cost studies have indicated extremely long cost payback periods for the lower capacity equipment. More importantly, available commercial cooling equipment of this capacity is limited. The higher threshold is consistent with ASHRAE 90.1-2010.

COMMENT: "We recommend to DOS that the effective date of this modification to Title 19 NYCRR be set at 150 days following enactment.

RESPONSE - After careful consideration, a decision has been reached to establish the effective date of January 1, 2015 for the Energy Code.

COMMENT- we suggest that the "2012 IECC Administrative, Provisions, Exceptions, allows exception for interior lighting should also apply to exterior lighting.

RESPONSE The applicability of the exception is limited generally to small interior spaces within a building. Applicability of the exception is limited solely to interior lighting. It would not be appropriate to extend the exception to exterior lighting, which will lower stringency of the code.

COMMENT- 2012 IECC Chapter C4, Minimum efficiencies for "Warm air furnaces, gas fired" have provided two options for Climate Zone 4, those being 90 AFUE (annual fuel utilization efficiency) or 92 AFUE. Which one is applicable?

RESPONSE: Minimum efficiencies for "Warm air furnaces, gas fired" Table C406.2(4) contains a foot note "c" which indicates "Warm air furnaces, gas fired units shall be permitted to comply with either rating".

COMMENT; There may be a problem when 2012 IECC, references sections of current Uniform codes. The updated Energy Code may be referring to code sections that are not in the present in the 2010 NY State code books (the Uniform Code).

RESPONSE: The text of the 2012 IECC and the Uniform Codes have been reviewed for consistency and concurrence.

COMMENT- 2012 IECC Chapter C4, the variable air volume (VAV), the threshold should remain at the 7.5 Horsepower value, rather than changing to a 5 Horsepower threshold.

RESPONSE: This modification is part of a parity adjustment, between the 2012 IECC and ASHRAE 90.1-2010. The adjustment of moving from 7.5 to 5 Horsepower threshold for requiring VAV, was given in the report titled "Pacific Northwest National Laboratories (PNNL) 22760" - Appendix "B. The amendment suggested cannot be made, since parity between the two codes would be affected.

COMMENT- "2012 IECC Section C403.4.5: Revise Exception No. 3 to include building process needs that require minimum (higher than rates allowed by code) air circulation rates.

RESPONSE: Section C403.4.5, exception #5 already covers this requirement for process needs.

COMMENT- the term "Ev" is not defined in the 2010 Mechanical Code of New York State.

RESPONSE: a reference has been added to the 2014 Supplement to define the term "Ev."

COMMENT- ASHRAE Standard 90.1, Voltage Drop: requirement for maximum 2% voltage drop for electrical feeders and 3% for branch circuits is punitive to high rise buildings, creating significant cost for oversized electrical feeders. We suggest eliminating these requirements in favor of 5% voltage drop for the combination of feeder and branch circuit.

RESPONSE: A decision has been made to move requirements for 2% voltage drop for electrical feeders and 3% for branch circuits from Mandatory to Prescriptive provisions (of 90.1). In design of high rise buildings, moving the feeder requirements to "prescriptive" requirements will allow the designer to create a tradeoff of the voltage drop in the building design, without losing the efficiency gain of the requirement.

COMMENT: The practice of providing continuous insulation on a mass wall or other type of wall construction that abuts side lot lines or adjoining side lot line buildings is impossible to accomplish.

RESPONSE: The Energy Code of New York State does not require placement of continuous insulation on exterior of mass walls, additionally, utilizing mass walls for fire separations are not a code requirement.

COMMENT: Add new sections to the Residential lighting provisions for Outdoor Lighting Fixtures, Shielding Requirements, Maximum Lumen Output, and the use of Motion Sensors and Timers.

RESPONSE: this purpose of this Rulemaking is to revise provisions for Commercial Construction. The proposal intends to modify provisions of Residential Energy Code.

COMMENT: suggest modifying illumination set points of ASHRAE 90.1-2010 for daylight side lighting.

RESPONSE: illumination set points are contained in the PNNL report "National Cost-effectiveness of ASHRAE Standard 90.1-2010 compared to ASHRAE Standard 90.1-2007" The recommendations of the report are incorporated as part of the a cost payback function of the report. This comment attempts to incorporate a sizeable modification to the 2012 IECC, without the benefit of a cost assessment study.

COMMENT: We suggest that the IECC-2012 Lighting Power Allowances Should Match Standard ASHRAE 90.1-2010.

RESPONSE: This attempts to incorporate a sizeable modification to the 2012 IECC. A change of this magnitude would require an impact study, to determine overall impact and potential unintended consequences, and would also require a cost assessment study.

COMMENT: Suggest to re word lighting requirements of IECC-2012 for dwelling units within commercial buildings, allowing a minimum of 75% high efficacy lamps in permanently installed fixtures.

RESPONSE: This change improves the language by a reasonable rewording of the code section in a clearer manner.

COMMENT: 2012 IECC should be modified for options for lighting to include an across the board 10 percent in lighting power reduction.

RESPONSE: This change would move the 2012 IECC provisions ahead to IECC 2015. The cost impact of the change has not been provided. Lacking this data, it would not be possible to consider this potential modification.

COMMENT: Modify the entire Lighting Controls section(s) of IECC-2012 by a complete reorganization of the code sections regulating lighting control.

RESPONSE: A change of this magnitude may have unintended consequences. This comment attempts to incorporate a sizeable modification to the 2012 IECC, which would be better served by considerable study. The cost impact of the change has not been provided.

COMMENT: We propose deleting tandem wiring requirements, deleting delete redundant exterior lighting efficiency requirements, and to clarifying wattage calculation methodology for low voltage lighting.

RESPONSE: Since these modifications are primarily clarifications, this will create beneficial change to the lighting provisions of the code, in part removing outdated lighting requirements. Cost impact has not been provided with this proposal.

COMMENT: Clarify applicability of Building Façade Lighting Efficiency of 2012 IECC by adoption of provisions of the IECC 2015.

RESPONSE: The modification suggests moving the 2012 IECC provisions ahead to IECC 2015 Cost impact has not been provided with this proposal.

COMMENT: Modify 2012 IECC terminology when describing day-lighting controls, replace with the IECC 2015 lighting control sections.

RESPONSE: The modifications suggested would change terminology to that found in IECC 2015 which may have unintended consequences. This comment attempts to incorporate a sizeable modification to the 2012 IECC, which would be better served by considerable study, including a cost impact study.

## NOTICE OF ADOPTION

### Minimum Standards for Code Enforcement Training

**I.D. No.** DOS-40-14-00020-A

**Filing No.** 1067

**Filing Date:** 2014-12-16

**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Parts 434, 435 and 1208; and addition of new Part 1208 to Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 376-a and 381

**Subject:** Minimum standards for code enforcement training.

**Purpose:** To establish minimum training standards so as to increase the level of competency and reliability of code enforcement personnel.

**Substance of final rule:** Section 376-a of the Executive Law authorizes the Secretary of State to promulgate rules and regulations relating to training of personnel charged with enforcement of the Uniform Code and/or the Energy Code, including, but not limited to, rules and regulations relating to code enforcement training programs for such code enforcement personnel; minimum courses of study, attendance requirements, and equip-

ment and facilities required for such code enforcement training programs; qualifications for instructors for such code enforcement training programs; requirements of minimum basic training which code enforcement personnel must complete in order to be eligible for continued employment or permanent appointment and the time within which such basic training must be completed; and requirements for in-service training programs and advanced in-service training programs for code enforcement personnel. The rule will further the legislative objective of ensuring that administration and enforcement of the Uniform Fire Prevention and Building Code ("Uniform Code") be conducted in a manner that satisfies the minimum standards established by the rules and regulations promulgated by the Secretary of State pursuant to Executive Law sections 376-a and 381.

This rule repeals 19 NYCRR Part 434, 19 NYCRR Part 435 and 19 NYCRR Part 1208. A new Part 1208 is added to Title 19 of the Official Compilation of Codes, Rules, and Regulations of the State of New York to establish requirements for the training of code enforcement personnel that conform to the directives of Executive Law § § 376-a and 383.

Section 1208-1.1 of Part 1208 provides an introduction to the regulation, and identifies its purpose as the promulgation of requirements relating to the training of code enforcement personnel who work for local governments, counties or State agencies that administer and enforce the Uniform Code and/or the State Energy Conservation Construction Code ("Energy Code"). Such purpose will be achieved by providing for a certification of such code enforcement personnel, specifying the subject matter of individual courses included as part of the training, and establishing the required qualifications of the instructors who teach such courses. Section 1208-1.2 sets forth definitions for certain terms used in the text of the regulation.

Section 1208-2.1 establishes the minimum training requirements for Building Safety Inspectors and Code Enforcement Officials who perform enforcement activities. In addition, the section provides that local governments, counties or State agencies that employ building safety inspectors or code enforcement officials may impose more stringent training requirements for such staff.

Section 1208-2.2 identifies the duties relating to code enforcement training of local governments, counties and State Agencies responsible for administration and enforcement of the Uniform Code and/or the Energy Code. The section requires certification of Building Safety Inspectors and Code Enforcement Officials designated by local governments, counties or State agencies for administration and enforcement of all or a portion of the Uniform Code and Energy Code.

Section 1208-3.1 establishes the specific requirements for certification as a Building Safety Inspector and Code Enforcement Official. To maintain such certification, such person must satisfy the required In-service Training established in the regulation. Additionally, this section addresses the requirements for a change in the level of certification of Building Safety Inspector and Code Enforcement Official.

Section 1208-3.2 establishes the requirements for the Basic Training Programs required for certification as a Building Safety Inspector and Code Enforcement Official. The section specifies the required training hours, the topics that need to be addressed, and the time within which each Basic Training Program must be completed. Additionally, the section specifies the allowance and requirements for filing for a waiver for one or more of the Basic Training Courses.

Section 1208-3.3 establishes the requirements for In-service Training. To maintain certification, a Certified Building Safety Inspector or a Certified Code Enforcement Official must satisfy the applicable in-service training requirements set forth in this section. A Certified Building Safety Inspector must successfully complete a minimum of 6 hours of in-service training during each calendar year. A Certified Code Enforcement Official must successfully complete a minimum of 24 hours of in-service training each calendar year. This section specifies the topic areas and minimum hours that need to be included in the annual in-service training for both Building Safety Inspectors and Code Enforcement Officials. Additionally, a specified number of training hours can be met through online learning and professional development electives. This section addresses the specific course requirements, adequate documentation, and reporting requirements associated with these alternative learning options.

Section 1208-3.4 establishes the requirements for Advanced In-service Training. The Secretary may from time to time require a Certified Building Safety Inspector or a Certified Code Enforcement Official to receive advanced in-service training, not to exceed 24 hours annually, relating to amendments, revisions, or additions to the Uniform Code and/or the Energy Code; other changes in law; development in construction technologies or techniques; or other matters which, in the opinion of the Secretary, warrant specific training. Additionally, this section provides that each hour of advanced in-service training successfully completed by a Certified Building Safety Inspector or a Certified Code Enforcement Official shall count toward satisfaction of his or her in-service training requirement for the calendar year in which such advanced in-service training is received.

Section 1208-3.5 establishes when the certification of a Building Safety Inspector or a Code Enforcement Official may be designated as inactive or be revoked. The Secretary shall designate certification of a Certified Building Safety Inspector or a Certified Code Enforcement Official as inactive, if such person fails to satisfy the applicable in-service training requirement during any calendar year or if such person fails to satisfy any applicable advanced in-service training requirement within the time specified by the Secretary. This section establishes that an adjustment and/or conditions to the inactive status may be made by the Secretary, provided that the Certified Building Safety Inspector or Certified Code Enforcement Official documents good cause, and circumstances make it impossible for the Certified Building Safety Inspector or Certified Code Enforcement Official to comply with the in-service training requirement or advanced in-service training requirement in a timely manner. Additionally, this section establishes the procedures and requirements for returning to "active" status after a certification either has been designated as inactive or revoked.

Section 1208-4.1 establishes the requirements for the certification of Training Courses. This section establishes minimum requirements, procedures, documentation and applications required for certifying training courses by the Department. Additionally, the section provides for revocation of certifications, specifying the reasons and procedures for a revocation by the Secretary.

Section 1208-4.2 establishes the requirements for the certification of Standard Instructors. This section establishes minimum requirements, procedures, documentation and applications required for certifying Standard Instructors by the Department. Additionally, the section provides for revocation of a certification, specifying the reasons and procedures for any such revocation.

Section 1208-4.3 establishes the requirements for the certification of Adjunct Instructors. This section establishes minimum requirements, procedures and documentation required for certifying Adjunct Instructors by the Department. Additionally, the section provides for revocation of a certification, specifying the reasons and procedures for any such revocation.

Section 1208-5.1 establishes requirements for any application made under this Part for approval, certification, waiver, exemption or extension. Such applications shall be in writing and include information and documentation establishing that the applicant satisfies the required criteria.

Section 1208-5.2 provides that the Department shall maintain a list of Certified Building Safety Inspectors and Certified Code Enforcement Officials, and may post such list on the Department's website. Additionally, this section provides that the Department may omit from such website list any Certified Building Safety Inspector or Certified Code Enforcement Official who has failed to complete required in-service or advanced in-service training or whose certification has been designated inactive or been revoked.

Section 1208-5.3 establishes the effective date of the rule as January 1, 2015. Additionally, this section states that this Part shall supersede any and all inconsistent provisions in 19 NYCRR Part 426.

Section 1208-5.4 establishes transitional provisions for persons holding a certification issued pursuant to former 19 NYCRR Part 434 for Code Enforcement Official, Code Compliance Technician, Standard Instructor or Adjunct Instructor.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 1208-1.1, 1208-3.2(b) and 1208-4.1(d).

**Text of rule and any required statements and analyses may be obtained from:** Mark Blanke, Department of State, Division of Building Standards and Codes, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Mark.Blanke@dos.ny.gov

#### **Revised Regulatory Impact Statement**

Changes made to the rule text since publication of the Notice of Proposed Rule Making are described below. These changes do not affect the issues addressed in the Regulatory Impact Statement and, therefore, a Revised Regulatory Impact Statement is not required.

Text was added to line 8 of the first paragraph of Section 1208-1.1 (Introduction and purpose) to clarify that minimum basic training and in-service training requirements will apply to personnel charged with administration and enforcement of the Uniform Code (i.e. Uniform Fire Prevention and Building Code) as well as the Energy Code. Such change corrects an inadvertent omission in the proposed rule text.

Text was added to subdivision (b) of section 1208-3.2 (Basic training programs) to revise the listed topic area "Emergency planning (2 Hours)" to read "Emergency planning and the role of the BSI and CEO in providing post disaster assistance (2 hours). This change clarifies the intended subject matter of the listed training topic in response to a public comment stating that required basic training for building safety inspectors and code enforcement officials does not include disaster preparedness training.

Subdivision (d) of section 1208-4.1 (Certification of training courses)

was corrected to change the reference in line 6 of the subdivision from subdivision (e) to subdivision (c). Such change corrects an inadvertent error in the proposed rule text.

None of these nonsubstantive changes made to the proposed rule necessitate a revised regulatory impact statement.

#### **Revised Regulatory Flexibility Analysis**

Changes made to the rule text since publication of the Notice of Proposed Rule Making are described below. These changes do not affect the issues addressed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and, therefore, a Revised Regulatory Flexibility Analysis is not required.

Text was added to line 8 of the first paragraph of Section 1208-1.1 (Introduction and purpose) to clarify that minimum basic training and in-service training requirements will apply to personnel charged with administration and enforcement of the Uniform Code (i.e. Uniform Fire Prevention and Building Code) as well as the Energy Code. Such change corrects an inadvertent omission in the proposed rule text.

Text was added to subdivision (b) of section 1208-3.2 (Basic training programs) to revise the listed topic area "Emergency planning (2 Hours)" to read "Emergency planning and the role of the BSI and CEO in providing post disaster assistance (2 hours). This change clarifies the intended subject matter of the listed training topic in response to a public comment stating that required basic training for building safety inspectors and code enforcement officials does not include disaster preparedness training.

Subdivision (d) of section 1208-4.1 (Certification of training courses) was corrected to change the reference in line 6 of the subdivision from subdivision (e) to subdivision (c). Such change corrects an inadvertent error in the proposed rule text.

None of these nonsubstantive changes made to the proposed rule necessitate a revised regulatory flexibility analysis.

#### **Revised Rural Area Flexibility Analysis**

Changes made to the rule text since publication of the Notice of Proposed Rule Making are described below. These changes do not affect the issues addressed in the Rural Area Flexibility Analysis and, therefore, a Revised Rural Area Flexibility Analysis is not required.

Text was added to line 8 of the first paragraph of Section 1208-1.1 (Introduction and purpose) to clarify that minimum basic training and in-service training requirements will apply to personnel charged with administration and enforcement of the Uniform Code (i.e. Uniform Fire Prevention and Building Code) as well as the Energy Code. Such change corrects an inadvertent omission in the proposed rule text.

Text was added to subdivision (b) of section 1208-3.2 (Basic training programs) to revise the listed topic area "Emergency planning (2 Hours)" to read "Emergency planning and the role of the BSI and CEO in providing post disaster assistance (2 hours). This change clarifies the intended subject matter of the listed training topic in response to a public comment stating that required basic training for building safety inspectors and code enforcement officials does not include disaster preparedness training.

Subdivision (d) of section 1208-4.1 (Certification of training courses) was corrected to change the reference in line 6 of the subdivision from subdivision (e) to subdivision (c). Such change corrects an inadvertent error in the proposed rule text.

None of these nonsubstantive changes made to the proposed rule necessitate a revised rural area flexibility analysis.

#### **Revised Job Impact Statement**

The Department of State has concluded, after reviewing the nature and purpose of the rule, that it will not have a substantial adverse impact on jobs and employment opportunities.

A new 19 NYCRR Part 1208 will establish improved minimum standards for training applicable to code enforcement personnel in the State of New York.

Code enforcement officials who enforce the Uniform Fire Prevention and Building Code and/or the State Energy Conservation Construction Code for a municipality will be required to comply with this regulation. Regulated parties, however, currently are already subject to substantially similar obligations under current regulations.

Based on the foregoing, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

During the designated public comment period for this rulemaking, the Department of State received the following comments.

COMMENT 1: Twenty-four hours of in-service training per year for code enforcement officials is overkill and has not been proven to make for better code enforcement.

RESPONSE TO COMMENT 1: As part of the process of developing a revised and updated regulation establishing minimum standards for the training of code enforcement personnel, the Department of State created a training work group comprised of a variety of stakeholders to provide input in developing the new regulation. The current regulatory requirement of 24 hours of annual in-service training for code enforcement officials was discussed in detail along with possible alternatives. The work group concluded that the requirement for 24 hours of annual in-service training should continue in an updated regulation in order to maintain the same level of education as was required in the past and consequently recommended its retention. The text of new 19 NYCRR Part 1208 represents the consensus of the training work group regarding the appropriate amount of annual in-service training for code enforcement officials, but also provides that all required 24 hours may be achieved by successfully completing online courses, which is a change from the prior regulations.

COMMENT 2: More qualifications are required at a minimum or a test to determine if someone is really qualified to lead a Building Department.

RESPONSE TO COMMENT 2: Part 1208 establishes the minimum training standards necessary for the certification of code enforcement officials and building safety inspectors in New York State. With regard to the issue of whether an individual is qualified to lead a building department, each municipality must determine the minimum qualifications for any specific position within its department. Therefore, it is the responsibility of the municipality to determine whether an individual is qualified for the particular position for which he or she is hired.

COMMENT 3: The International Code Council Certified Building Official certification should be offered as an option for new NYS Code Enforcement Official candidates.

RESPONSE 3: The new 19 NYCRR Part 1208 provides that third party certifications and training programs may qualify as alternative means of satisfying components of both basic and in-service training requirements for building safety inspectors and code enforcement officials. International Code Council certifications are among the third party certifications which may qualify as alternatives to specific components of required training.

COMMENT 4: We encourage the State of New York to go beyond the prescribed 4 hours (two [hours] residential, two [hours] commercial) of [energy] training required for initial credentialing.

RESPONSE 4: Part 1208 establishes the minimum number of hours to be spent on a specific topic. Additional hours in specific topic areas may be obtained based upon the needs of an individual's specific employment.

COMMENT 5: Under Section 1208-3.2(d), a person with no codes training whatsoever can be hired by a municipality as a Building Safety Inspector or Code Enforcement Officer, and be performing that job for a year and a half, by which time he/she must have completed basic training.

RESPONSE 5: The current regulation (Part 434) requires that basic code enforcement training be completed within one year of initial appointment. After receiving input from the work group and public comments submitted while the rule was in development, an additional six months, for a total of 18 months (from initial appointment), is established by the new Part 1208 for the completion of basic code enforcement training.

COMMENT 6: Remote, canned online classes that completely remove the live, physical instructor and venue from the student cannot be a complete replacement for the entirety of one's basic codes training experience in a field where a majority of the work is literally performed "in the field" and not on a computer screen.

RESPONSE 6: Part 1208 contains provisions which allow for new technology in training such as online courses. While online training is an attractive alternative to traditional classroom instruction for some students, it will not be the preferred learning method for all students. Part 1208 does not mandate any one type of training method, online or classroom, over another type.

COMMENT 7: Inexperienced person working as a code enforcement official is given more leeway than a seasoned certified code enforcement official [in regards to requirements for basic and in-service training requirements].

RESPONSE 7: It is believed the comment refers to the provision in Part 1208 that requires basic code enforcement training to be completed within 18 months of initial appointment, while a certified code enforcement official must receive 24-hours of in-service training annually or their certification will be designated as inactive. The current regulation (Part 434) requires that basic code enforcement training be completed within one year of initial appointment. After receiving input from the work group and public comments submitted while the rule was in development, an additional six months, for a total of 18 months (from initial appointment), is established by the new Part 1208 for the completion of basic code enforcement training. Part 1208 now contains provisions that allow certified code enforcement officials and building safety inspectors the flexibility of obtaining their required annual in-service training hours through online

training, Department of State-approved courses, or professional development electives.

COMMENTS 8 and 9: How many online courses are currently approved by the Department for in-service credit and how much do the courses cost? Sufficient online training courses have not thus far been established and approved by the Secretary, so delaying this rule by at least one year would give sufficient time for the Secretary to approve online training so that it does save local governments money.

RESPONSE to 8 and 9: The Department of State offers some online training within the Statewide Learning Management System at no cost. Other state agencies also offer Department of State-approved online training at no cost. Additionally, online courses can be taken as professional development electives to meet in-service training requirements. By using professional development electives, Part 1208 offers increased flexibility in satisfying annual in-service training requirements through both Department of State-approved online training and other accessible online training.

COMMENT 10: In the Regulatory Flexibility Analysis for this proposal, a statement is made that "no reporting or recordkeeping requirements are imposed upon small businesses or local governments by the rule". This is contradictory to the proposed requirement for annual in-service training credit by attending a professional development elective.

RESPONSE 10: Part 1208 allows for the completion of professional development electives to be used as an alternative method for satisfying the annual 24-hour in-service training requirement. Because the use of professional development electives is solely the decision of a code enforcement official or building safety inspector, there is no mandatory reporting or recordkeeping requirement imposed on local government.

COMMENT 11: If the training could be done locally by Department of State regional staff, the burden on code enforcement officials would be minimized and the benefits would be far greater.

RESPONSE 11: Part 1208 establishes the minimum training standards for certification of code enforcement officials and building safety inspectors in New York State. The allocation and use of Department of State staff and resources is a matter falling outside the subject matter of this regulation.

COMMENT 12: We still feel that it is necessary to have an opportunity to be heard when an individual has their "certification status" changed to inactive. This may just have been an oversight in the text.

RESPONSE 12: Part 1208 provides that, when good cause is shown, the Secretary of State may make adjustments and/or impose conditions for in-service training requirements before changing a certified building safety inspector's or a certified code enforcement official's certification status.

COMMENT 13: Page 3- Section 1208-1.1, second sentence, item 2- Shouldn't this language read "Uniform Code and/or Energy Code"?

RESPONSE 13: The typographical error in Section 1208-1.1 has been corrected.

COMMENT 14: Page 19-20- Section 1208-3.2(c). There is nothing in the minimum basic training regulations that require disaster preparedness training.

RESPONSE 14: Part 1208 added a basic training topic titled "Emergency Preparedness," with disaster training taught as part of the subject matter. To clarify the topic, it has been renamed: "Emergency Preparedness and the role of the Building Safety Inspector and the Code Enforcement Official in providing Post-disaster Assistance."

COMMENT 15: Page 28- Section 1208-3.5(a). This section does not provide for a notice and opportunity to be heard by the individual.

RESPONSE 15: Part 1208 provides that, when good cause is shown, the Secretary of State may make adjustments and/or impose conditions for in-service training requirements before changing a certified building safety inspector's or a certified code enforcement official's certification status.

COMMENT 16: Page 33- 1208-4.1(d). There appears to be an incorrect or confusing reference here.

RESPONSE 16: The typographical error has been corrected. The paragraph now correctly references subdivision (e) rather than (c) in the rule text.

COMMENT 17: 8. Page 36 - Section 1208-4.2(b) - The language appears to require a renewal of Instructor certification but there is no language regulating the renewal process.

RESPONSE 17: As stated in 1208-4.3(b), when certification as an instructor is issued, the certification may be renewed on the date specified in such certificate if the Secretary finds that the instructor still qualifies for certification as an adjunct instructor.

COMMENT 18: Page 40-41 -Section 1208-5.4(a) and (b). The language states that a person "MAY" be certified only after a written request. The Department of State should already have a list of certified persons.

RESPONSE 18: Section 1208-5.4 does not require that a currently certified Code Enforcement Official submit a written request to maintain such certification as part of the transition process to Part 1208. Such requirement was a part of an earlier draft of Part 1208. The Department

does not currently have a list and/or database of certified Building Safety Inspectors as such is a new designation. Individuals currently certified as Code Compliance Technicians will need to register under Part 1208 to establish and maintain certification as a Building Safety Inspector.

**NOTICE OF ADOPTION**

**Appraiser Certification and License Update Requirements**

**I.D. No.** DOS-41-14-00020-A  
**Filing No.** 1066  
**Filing Date:** 2014-12-16  
**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 1103.2(a), (b)(2), (c)(2), (3), (d)(2), (3), 1103.6(b), (e), (g), 1103.10(b), 1107.4(a)(1) and 1107.12 of Title 19 NYCRR.

**Statutory authority:** Executive Law, section 160-d; and art. 6-E

**Subject:** Appraiser Certification and License Update Requirements.

**Purpose:** To conform current appraiser qualifications to federal standards.

**Text or summary was published** in the October 15, 2014 issue of the Register, I.D. No. DOS-41-14-00020-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** David A. Mossberg, Esq., NYS Dept. of State, 123 William St., 20th Fl., New York, NY 10038, (212) 417-2063, email: david.mossberg@dos.ny.gov

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Appraiser Certification and License Update Requirements**

**I.D. No.** DOS-41-14-00021-A  
**Filing No.** 1065  
**Filing Date:** 2014-12-16  
**Effective Date:** 2015-01-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 1102.2(a), (b), (c), 1102.3(a), 1102.4, 1103.4(b)(1), (c) and 1104.1(b)(1) of Title 19 NYCRR.

**Statutory authority:** Executive Law, section 160-d and art. 6-E

**Subject:** Appraiser Certification and License Update Requirements.

**Purpose:** To conform current appraiser qualifications to federal standards while simultaneously removing unnecessary requirements.

**Text of final rule:** Subdivisions (a), (b), and (c) of 19 NYCRR § 1102.2 are amended to read as follows:

(a) Applicants for residential licensing must have at least 2,000 hours of real estate appraisal experience over a period of not less than 24 months. [At least 75 percent of that experience must be residential appraisal experience.]

(b) Applicants for residential certification must have at least 2,500 hours of real estate appraisal experience over a period of not less than 24 months. [At least 75 percent of that experience must be residential appraisal experience.] The residential experience must include experience in single-family, two- to four-family, cooperatives, condominiums, or other residential experience. [At least 80 percent of the residential experience must be in the single-family category. At least 10 percent of the residential experience must be in each of the remaining residential categories set forth in § 1102.3 of this Part.]

(c) Applicants for general certification must have at least 3,000 hours of experience over a period of not less than 30 months, of which, a minimum of 1500 hours must be in non-residential appraisal work. [At least 75 percent of that experience must be general real estate experience. The general experience must include experience in multi-family properties, commercial, industrial or other non-residential categories. At least 60 percent

of the general experience must be in one of the general categories as set forth in § 1102.3 of this Part. At least 20 percent of the general experience must be in each of the remaining categories.]

Subdivision (a) of 19 NYCRR § 1102.3 is amended to read as follows:

(a) Hours of experience shall be credited to an applicant based on actual time spent on appraisal assignments up to a maximum numbers of hours in accordance with the following schedule. [However, to ensure that experience is distributed over a reasonable period of time, an applicant may not claim or be credited with more than 400 experience hours for any calendar quarter.]

APPRAISAL EXPERIENCE SCHEDULE

Type of Property Appraised	Assigned hours
Residential	
Residential Single-Family (Single Coop or Condo) . . . . .	6
Residential Multi-Family (2-4 units) . . . . .	12
Vacant Lot (Residential, 1-4 units) . . . . .	3
Farm (Less than 100 acres, with residence) . . . . .	12
General	
Land: Farms of 100 acres or more in size, undeveloped tracts, residential multifamily sites, commercial sites, industrial sites . . . . .	18
Residential Multi-Family (5-12 units):	
Apartments, condominiums, townhouses and mobile home parks . . . . .	36
Residential Multi-Family (13+ units):	
Apartments, condominiums, townhouses and mobile home parks . . . . .	48
Commercial/Industrial Single-Tenant: Office buildings, R&D, retail stores, restaurants, service stations, warehouses, day care centers, etc. . . . .	36
Commercial/Industrial Multi-Tenant: Office buildings, R&D, shopping centers, hotels, warehouses . . . . .	60
Manufacturing plants . . . . .	48
Institutional: Rest homes, nursing homes, hospitals, schools, churches, government buildings . . . . .	48

Subdivisions (a), (b), (c), and (d) of 19 NYCRR § 1102.4 are repealed as follows:

[(a) For standard appraisals, an applicant shall receive full credit for an appraisal if the applicant performed at least 75 percent of the work associated with the appraisal even if the applicant’s work was reviewed by a supervising appraiser who signed the appraisal report. For the purposes of this section, the work associated with an appraisal shall include preparation of the appraisal report.

(b) For standard appraisals, an applicant shall receive pro rata credit for performing less than 75 percent of the work associated with an appraisal. For example, if an applicant performed 50 percent of the work associated with an appraisal, the applicant may claim 50 percent of the experience credit associated with performing that type of appraisal. However, an applicant shall not receive any credit for an appraisal if the applicant performed less than 25 percent of the work associated with the appraisal.

(c) For review appraisals, an applicant shall receive 25 percent of the hours normally credited for an appraisal if the applicant performed a review appraisal, which shall include a field review, a documentary review, or a combination of both.

(d) An applicant shall have the burden of establishing to the satisfaction of the Department of State that the applicant actually performed the work associated with the appraisal or appraisals which the applicant claims appraisal-experience credit.]

19 NYCRR § 1102.4 is added to read as follows:

§ 1102.4 Acceptable experience

An applicant shall have the burden of establishing to the satisfaction of the Department of State that the applicant actually performed the work associated with the appraisal or appraisals which the applicant claims appraisal-experience credit. Experience credit will only be granted for hours actually worked on an appraisal assignment provided that no applicant shall be permitted to claim experience hours in excess of the maximum hours per assignment as provided for by Section 1102.3 of this Part.

Subdivisions (b), and (c) of 19 NYCRR § 1103.4 are amended to read as follows:

(b) Supervising appraiser qualifications. Persons wishing to become a

supervisor of one or more appraiser assistants must provide evidence of having a general or residential appraiser certification in New York State and must have been state certified for a minimum of three years[.] and complete the Supervisory Appraiser/Trainee Appraiser course.

(1) Notwithstanding any other law, rule or regulation, all supervisory appraisers must complete the Supervisory Appraiser/Trainee Appraiser course no later than December 31, 2015 or prior to entering into any new Supervisory/Trainee Appraiser relationship after January 1, 2015.

(c) Ineligibility. An individual who has had a real estate broker, salesperson or an appraisal license or certification revoked or suspended or has been subject to any disciplinary action that affects the Supervisory Appraiser's legal eligibility to engage in appraisal practice within the last three years is ineligible to receive instructor approval from the Department and is ineligible to supervise appraiser assistants.

Subdivision (b)(1) of 19 NYCRR § 1104.1 is amended to read as follows:

(1) the state or territory's certification and licensing program *is in compliance with the provisions of* [has not been disapproved by the appraisal subcommittee of the Federal Financial Institutions Examination Council pursuant to] Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989;

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 1102.2(c).

**Text of rule and any required statements and analyses may be obtained from:** David A. Mossberg, Esq., NYS Dept. of State, 123 William St, 20th Fl., New York, NY 10038, (212) 417-2063, email: david.mossberg@dos.ny.gov

#### **Revised Regulatory Impact Statement**

The Department of State (the "Department") has determined that a revised regulatory impact statement is not necessary for this rulemaking.

While preparing new forms to implement the proposal, the Department discovered a drafting error which added unnecessary confusion.

The prior proposal included a new sentence which could have possibly conflicted with the original text. By correcting this typographical error, the Department is providing a clearer rule to applicants applying for a license as a general certified appraiser. Therefore, the rule, as amended by this Notice of Adoption, will not require a revised regulatory impact statement.

#### **Revised Regulatory Flexibility Analysis**

The Department of State (the "Department") has determined that a revised Regulatory Flexibility Analysis ("RFA") for small businesses and local governments is not necessary for this rulemaking.

While preparing new forms to implement the proposal, the Department discovered a drafting error which added unnecessary confusion.

The prior proposal included a new sentence which could have possibly conflicted with the original text. By correcting this typographical error, the Department is providing a clearer rule to applicants applying for a license as a general certified appraiser. Therefore, the rule, as amended by this Notice of Adoption, will not require a revised RFA.

#### **Revised Rural Area Flexibility Analysis**

The Department of State (the "Department") has determined that a Revised Rural Area Flexibility Analysis ("RAFA") is not necessary for this rulemaking as the change to the proposed rule will not have a substantial adverse impact on jobs and employment opportunities.

While preparing new forms to implement the proposal, the Department discovered a drafting error which added unnecessary confusion.

The prior proposal included a new sentence which could have possibly conflicted with the original text. By correcting this typographical error, the Department is providing a clearer rule to applicants applying for a license as a general certified appraiser. Therefore, the rule, as amended by this Notice of Adoption, will not require a revised RAFA.

#### **Revised Job Impact Statement**

The Department of State (the "Department") has determined that a revised job impact statement is not necessary for this rulemaking as the change to the proposed rule will not have a substantial adverse impact on jobs and employment opportunities.

While preparing new forms to implement the proposal, the Department discovered a drafting error which added unnecessary confusion.

The prior proposal included a new sentence which could have possibly conflicted with the original text. By correcting this typographical error, the Department is providing a clearer rule to applicants applying for a license as a general certified appraiser. Therefore, the rule, as amended by this Notice of Adoption, will not have a substantial adverse impact on jobs and employment opportunities within New York.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The agency received no public comment.

## Susquehanna River Basin Commission

### INFORMATION NOTICE

#### 18 CFR Part 806

#### Notice of Final Rulemaking

**SUMMARY:** This document contains final rules that would amend the regulations of the Susquehanna River Basin Commission (Commission) to clarify the water uses involved in hydrocarbon development that are subject to the consumptive use regulations, as implemented by the Approval by Rule (ABR) program.

**DATES:** Effective January 23, 2015.

**ADDRESSES:** Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788.

**FOR FURTHER INFORMATION CONTACT:** Jason E. Oyler, Esq., Regulatory Counsel, telephone: 717-238-0423, ext. 1312; fax: 717-238-2436; e-mail: joyler@srbc.net. Also, for further information on the final rulemaking, visit the Commission's website at [www.srbc.net](http://www.srbc.net).

#### SUPPLEMENTARY INFORMATION:

##### Comments and Responses to Proposed Rulemaking

Notice of proposed rulemaking was published in the Federal Register on September 26, 2014 (79 FR 57850); the New York Register on October 1, 2014; the Maryland Register on October 3, 2014; and the Pennsylvania Bulletin on November 1, 2014. The Commission convened a public hearing on November 6, 2014, in Harrisburg, Pennsylvania and a written comment period was held open through November 17, 2014.

##### General Comments

**Comment:** The Commission received comments supportive of the changes in the terms and definitions noted in the Rulemaking. The changes are reflective of the nature of the industry and are plainly straightforward.

**Response:** The Commission appreciates the comments.

**Comment:** One commenter asked that the rulemaking not be adopted because the proposed changes restrict Commission oversight.

**Response:** The Commission disagrees and notes that the proposed regulations strengthen its program and clarify a greater scope of water uses by the hydrocarbon development industry subject to the Commission's ABR program.

**Comment:** The regulations should provide for an appeal by an impacted stakeholder before a permit is issued.

**Response:** The ABR process provides for a comment period during which stakeholders may raise issues of concern regarding a project before an approval is issued. This public comment period is not changed by the rulemaking. No changes to the Commission's rules related to hearings and administrative appeals were proposed and are beyond the scope of this rulemaking. Further, allowing an appeal of a Commission approval prior to the issuance of such an approval would run contrary to longstanding principles of administrative law.

##### Comments by Section, Part 806

##### Section 806.3—Definitions

**Comment:** Revise the definition of "construction" to include the pad sites, access roads, rights-of-way for pipelines and intake area clearings as such project activities affect the environment.

**Response:** The Commission's definition of construction is appropriate for regulation of the withdrawal and consumptive use of water and appropriate for the ABR program for the use of water by hydrocarbon development projects. The ABR program does not regulate all environmental impacts of hydrocarbon development, rather the environmental impacts to which the commenter refers are regulated by the appropriate member jurisdictions through various permitting programs, including erosion and sediment control and oil and gas management. The ABR Program supports the regulation of other aspects of hydrocarbon development projects by requiring in § 806.22(f)(7) that the project sponsor obtain all necessary permits or approvals required for the project from other federal, state or local government agencies.

**Comment:** The term "drilling pad site" should be changed to "well pad site" because many of the activities that are regulated on the pad site go beyond just drilling.

**Response:** The term "drilling pad site" is currently used in the Commission's regulations, but was not defined. The term is used in

several sections and subsections not subject to the proposed rulemaking. For this reason, the Commission declines to make this change in this final rule. However, the Commission believes the comment has merit and will consider it in a forthcoming comprehensive rulemaking that is currently under development.

Comment: In the definition of “hydrocarbon development project,” the term “hydro-seeding” is used. It is recommended to use the term “hydroseeding or other revegetation activities” instead.

Response: The Commission agrees with the comment and has made the change in the final rule.

Comment: Language should be added clarifying that all water use on-site requires Commission approval.

Response: The definition of “hydrocarbon development project” contains language that covers all water-related activities and facilities on the drilling pad site, including activities and facilities associated with the production, maintenance, operation, closure, plugging and restoration of wells or drilling pad sites that would require consumptive water usage. The use of water for these activities will be subject to Commission approval through the ABR program.

Comment: The Commission is to be applauded for revising its definitions to include water used not only for well development and drilling, but also for infrastructure.

Response: The Commission appreciates the comment. The final rule retains the language extending the ABR approvals to specific water uses off the drilling pad site, which are water used for hydro-seeding or other revegetation activities, dust suppression, and hydro-excavation of access roads and underground lines, as well as tank cleanings, related to a drilling pad site or centralized impoundments.

Comment: The Commission should extend its review to beyond the well pad.

Response: The definition of “hydrocarbon development project” includes specified facilities and activities off the drilling pad site as noted in the prior response.

Comment: A commenter opposes the Commission’s responsibility for oversight ending once a gas well has been plugged.

Response: The definition of “hydrocarbon development project” provides such a project continues “until all post-plugging restoration is completed in accordance with all applicable member jurisdiction requirements.” The Commission finds that this is an appropriate time for the Commission’s jurisdiction under § 806.22(f) to cease as the project sponsor’s consumptive water use ceases at that point.

Comment: The definition of “project” should be expanded to go beyond any “independent activity.”

Response: The Commission declines to expand the scope of the definition of “project.” The term “project” as defined matches the definition in Section 1.2 of the Susquehanna River Basin Compact, P.L. 91-575. The rulemaking provides specific definitions for “hydrocarbon development project” and “unconventional natural gas development project” to add clarity to how these activities trigger the Commission’s oversight and jurisdiction.

Comment: The definition of “project” contains a typographical error. The word “additional” should be “addition.”

Response: The Commission agrees and the correction is made in the final rulemaking.

#### Section 806.15—Notice of Application

Comment: Section 806.15(e) should be amended to require notice in a newspaper of general circulation “serving the” area which the water obtained from such source will be initially used, replacing the existing language of a newspaper of general circulation “in each” area.

Response: This specific change was not a part of the proposed rulemaking. The Commission believes the existing language is adequate.

#### Section 806.22—Standards for consumptive uses of water

Comment: The term for approval under section 806.22(e)(7) should be 5 years instead of 15 years.

Response: The Approval by Rule in subsection 806.22(e) relates to projects where the sole source of water is from a public water supply. This type of ABR approval currently has a term of 15 years, and the Commission did not propose or contemplate any changes to this term in the proposed rulemaking. The Commission declines to make any change to the term provided in subsection 806.22(e)(7).

Comment: The wording of subsection 806.22(f)(4) should be changed from “per gas well” to “per oil and gas well” because hydrocarbon development projects under the ABR program can relate to oil wells, gas wells or both.

Response: The Commission agrees with the comment and has made the change in this final rulemaking.

Comment: The change to subsection 806.22(f)(4) from “dust control”

to “other project related activity” is an attempt to obfuscate an industry practice of using hydrofracturing wastewater by spraying it on the roads for dust suppression by folding into a broader term.

Response: The Commission disagrees with the comment. The term “dust control” in subsection 806.22(f)(4) has been replaced with the broader term “other project related activity” to appropriately reflect the broader scope of the consumptive water uses regulated by the Commission. The final regulations clarify that any consumptive uses of water for dust control on roads related to a drilling pad site must be accounted for under the project sponsor’s ABR approval. Whether a project sponsor can use waste water for dust suppression on roads is a matter regulated by the Commission’s member jurisdictions, and is beyond the scope of this rulemaking.

Comment: In subsection 806.22(f)(10), the Commission noted that it was considering whether to change the duration of approvals issued under the ABR program from 5 years to a longer term of up to 15 years and specifically sought public comment regarding such change. Some commenters expressed support for a change to 15 years out of interest in greater flexibility for the industry in planning and suggested that a longer term would potentially result in fewer sources being permitted for use. One commenter recommended an initial term of five year and renewal terms of 15 years. Other commenters opposed any extension of the current 5-year term noting: Shorter terms allow the Commission to better consider evolving technologies and changes in industry practices; longer terms reduce opportunities for public input into ABRs; and shorter terms allow the Commission to more frequently adjust necessary management practices, procedures and reporting requirements.

Response: The rulemaking as proposed retained the 5-year term currently in subsection 806.22(f)(10). Based on its deliberations, including the public comment, the Commission has decided to retain the 5-year term in this final rulemaking.

#### Transition Issues

This rulemaking takes effect on January 23, 2015. The Commission recognizes that project sponsors may have let ABRs expire for currently operating projects that, based on the clarifications provided in this final rule, will need to be covered under an ABR approval. The Commission encourages project sponsors to submit applications for these previously approved hydrocarbon development projects in a timely fashion. If application is made prior to June 30, 2015, the application may be made at the fee for ABR renewals. Any applications made after June 30, 2015, for currently operating projects that allowed their ABR approvals to expire will be made at the fee for new ABR applications and will be subject to active compliance efforts by the Commission, up to and including the assessment of civil penalties.

#### List of Subjects in 18 CFR Part 806

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission amends 18 CFR part 806 as follows:

#### PART 806—REVIEW AND APPROVAL OF PROJECTS

1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

#### Subpart A – General Provisions

2. In § 806.3:

- a. Revise the definition for “Construction”;
- b. Add, in alphabetical order, a definition of “Drilling pad site”;
- c. Remove the definition for “Hydrocarbon development” and add in its place, in alphabetical order, the definition of “Hydrocarbon development project”;
- d. Revise the definition of “Project”; and
- e. Remove the definition for “Unconventional natural gas development” and add in its place, in alphabetical order, the definition of “Unconventional natural gas development project”.

The revisions and additions read as follows:

#### § 806.3 Definitions.

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Construction. To physically initiate assemblage, installation, erection or fabrication of any facility, involving or intended for the withdrawal, conveyance, storage or consumptive use of the waters of the basin. For purposes of unconventional natural gas development projects subject to review and approval pursuant to § 806.4(a)(8), initiation of construction shall be deemed to commence upon the drilling (spudding) of a gas well, or the initiation of construction of any water impoundment or other water-related facility to serve the project, whichever comes first.

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Drilling pad site. The area occupied by the equipment or facilities

necessary for or incidental to drilling, production or plugging of one or more hydrocarbon development wells and upon which such drilling has or is intended to occur.

\*\*\*\*\*

Hydrocarbon development project. A project undertaken for the purpose of extraction of liquid or gaseous hydrocarbons from geologic formations, including but not limited to the drilling, casing, cementing, stimulation and completion of unconventional natural gas development wells, and all other activities and facilities associated with the foregoing or with the production, maintenance, operation, closure, plugging and restoration of such wells or drilling pad sites that require water for purposes including but not limited to, re-stimulation and/or re-completion of wells, fresh water injection of production tubing, use of coiled tubing units, pumping, cement hydration, dust suppression, and hydro-seeding or other revegetation activities, until all post-plugging restoration is completed in accordance with all applicable member jurisdiction requirements. The project includes water used for hydro-seeding or other revegetation activities, dust suppression and hydro-excavation of access roads and underground lines, as well as cleaning of tanks, related to a drilling pad site and centralized impoundments.

\*\*\*\*\*

Project. Any work, service, activity or facility undertaken, which is separately planned, financed or identified by the Commission, or any separate facility undertaken or to be undertaken by the Commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources, which can be established and utilized independently, or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation.

\*\*\*\*\*

Unconventional natural gas development project. A hydrocarbon development project undertaken for the purpose of extraction of gaseous hydrocarbons from low permeability geologic formations utilizing enhanced drilling, stimulation or recovery techniques.

\*\*\*\*\*

3. In § 806.15, revise paragraph (e) to read as follows:  
§ 806.15 Notice of application.

\*\*\*\*\*

(e) For applications submitted under § 806.22(f)(13) for a wastewater discharge source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in each area within which the water obtained from such source will initially be used for hydrocarbon development.

\*\*\*\*\*

4. In § 806.22, revise paragraphs (e)(7), (f) introductory text, (f)(1), (f)(4), (f)(10), (f)(11) introductory text, and (f)(12) to read as follows:  
§ 806.22 Standards for consumptive uses of water.

\*\*\*\*\*

(e) \*\*\*

(7) Approval by rule shall be effective upon issuance by the Executive Director to the project sponsor, shall expire 15 years from the date of such issuance, and supersede any previous consumptive use approvals to the extent applicable to the project.

\*\*\*\*\*

(f) Approval by rule for consumptive use related to unconventional natural gas and other hydrocarbon development projects.

(1) Any unconventional natural gas development project subject to review and approval under § 806.4(a)(8), or any other hydrocarbon development project subject to review and approval under §§ 806.4, 806.5, or 806.6, shall be subject to review and approval by the Executive Director under this paragraph (f) regardless of the source or sources of water being used consumptively.

\*\*\*\*\*

(4) The project sponsor shall comply with metering, daily use monitoring and quarterly reporting as specified in § 806.30, or as otherwise required by the approval by rule. Daily use monitoring shall include amounts delivered or withdrawn per source, per day, and amounts used per oil or gas well or drilling pad site, per day, for well drilling, hydrofracture stimulation, hydrostatic testing, and other project-related activity. The foregoing shall apply to all water, including stimulation additives, flowback, drilling fluids, formation fluids and production fluids, utilized by the project. The project sponsor shall also submit a post-hydrofracture report in a form and manner as prescribed by the Commission.

\*\*\*\*\*

(10) Approval by rule shall be effective upon issuance by the

Executive Director to the project sponsor, shall expire five years from the date of such issuance, and supersede any previous consumptive use approvals to the extent applicable to the project.

(11) In addition to water sources approved for use by the project sponsor pursuant to § 806.4 or this section, a project sponsor issued an approval by rule pursuant to paragraph (f)(9) of this section may utilize any of the following water sources at the drilling pad site, subject to such monitoring and reporting requirements as the Commission may prescribe:

\*\*\*\*\*

(12) A project sponsor issued an approval by rule pursuant to paragraph (f)(9) of this section may utilize a source of water approved by the Commission pursuant to § 806.4(a), or by the Executive Director pursuant to paragraph (f)(14) of this section, and issued to persons other than the project sponsor, provided any such source is approved for use in hydrocarbon development, the project sponsor has an agreement for its use, and at least 10 days prior to use, the project sponsor registers such source with the Commission on a form and in the manner prescribed by the Commission.

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Dated: December 16, 2014.  
Stephanie L. Richardson,  
Secretary to the Commission.

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## Department of Taxation and Finance

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### NOTICE OF ADOPTION

#### City of Yonkers Withholding Tables and Other Methods

**I.D. No.** TAF-43-14-00003-A

**Filing No.** 1050

**Filing Date:** 2014-12-16

**Effective Date:** 2014-12-31

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Repeal of Appendix 10-A; addition of new Appendix 10-A; and amendment of section 251.1(b) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subdivision First, 671(a)(1), 697(a), 1321, 1329(a), 1332(a); Code of the City of Yonkers, sections 15-105, 15-108(a), 15-111; City of Yonkers Local Laws No. 6-2013 and 11-2014; and L. 2009, ch. 57, part Z-1, section 5 and L. 2013, ch. 70

**Subject:** City of Yonkers withholding tables and other methods.

**Purpose:** To provide current City of Yonkers withholding tables and other methods.

**Text or summary was published** in the October 29, 2014 issue of the Register, I.D. No. TAF-43-14-00003-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Kathleen D. O'Connell, Department of Taxation and Finance, Office of Counsel, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 530-4153, email: tax.regulations@tax.ny.gov

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

#### **Assessment of Public Comment**

The agency received no public comment.

## Office of Temporary and Disability Assistance

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Supplemental Nutrition Assistance Program (SNAP)

**I.D. No.** TDA-52-14-00001-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of sections 358-1.1, 358-1.2, 358-2.27, 381.2, 651.1 and 651.2; repeal of Part 388 of Title 18 NYCRR.

**Statutory authority:** 7 USC ch. 51 and sections 2011 and 2013; Social Services Law, sections 20, 34, 95 and art. 5, title 9-B; L. 2003, ch. 360; L. 2005, ch. 57, part C; L. 2012, ch. 41

**Subject:** “Food Stamp Program” renamed “Supplemental Nutrition Assistance Program” (SNAP); Food Assistance Program (FAP) repealed; certain public assistance employment program reporting requirements modified.

**Purpose:** To render subject State regulations consistent with cited statutory authority and chapter 360 of the Laws of 2003, part C of chapter 57 of the Laws of 2005 and chapter 41 of the Laws of 2012.

**Text of proposed rule:** The content description for Article 1 of Subchapter B of Chapter II Title 18 NYCRR is amended to read as follows:

358 Fair Hearings: Family Assistance, Safety Net Assistance, Medical Assistance, Emergency Assistance to Aged, Blind or Disabled Persons, Emergency Assistance to Needy Families with Children, [Food Stamps, Food Assistance,] *Supplemental Nutrition Assistance Program*, Home Energy Assistance, and Services Funded Through the Department of Family Assistance[, and Any Program or Service Administered Through the New York State Department of Labor (DOL) as Described in 12 NYCRR Part 1300]

The caption for Title 18 NYCRR Part 358 is amended to read as follows:

FAIR HEARINGS: FAMILY ASSISTANCE, SAFETY NET ASSISTANCE, MEDICAL ASSISTANCE, EMERGENCY ASSISTANCE TO AGED, BLIND OR DISABLED PERSONS, EMERGENCY ASSISTANCE TO NEEDY FAMILIES WITH CHILDREN, [FOOD STAMPS, FOOD ASSISTANCE,] *SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM*, HOME ENERGY ASSISTANCE, AND SERVICES FUNDED THROUGH THE DEPARTMENT OF FAMILY ASSISTANCE

Title 18 NYCRR § 358-1.1 is amended to read as follows:  
Section 358-1.1 General.

These regulations govern the fair hearing process and establish the rights and obligations of applicants, recipients, and social services agencies when an applicant or recipient seeks review of a social services agency action or determination regarding that individual’s assistance or benefits under public assistance programs, medical assistance, [food stamp, food assistance] *the supplemental nutrition assistance program (SNAP)*, and the home energy assistance *program (HEAP)* [programs] and under various service programs as defined in section 358-2.20 of this Part and any program or service administered through the New York State Office of Temporary and Disability Assistance (OTDA) as described in 18 NYCRR Part 385.

Title 18 NYCRR § 358-1.2 is amended to read as follows:

Subdivisions (a)-(c) of § 358-1.2 are amended to read as follows:

(a) Notice. These regulations set forth what information you are entitled to receive if you have been accepted for or denied public assistance, medical assistance, HEAP, [food stamp] *or SNAP* benefits or services, or if there is to be a discontinuance, reduction, or suspension in the public assistance, medical assistance, [food stamp] *or SNAP* benefits or services which you are receiving, or if there is an increase in the public assistance, medical assistance, or [food stamp] *SNAP* benefits you are receiving, or if there is to be a change in the calculation of such assistance or benefits, or if you are involuntarily discharged from a tier II facility as defined in Part 900 of this Title.

(b) Timing. These regulations set forth the time periods within which you are obligated to request a fair hearing and/or conference if your application for public assistance, medical assistance, HEAP, [food stamp] *or SNAP* benefits or services is not acted upon in a timely manner, or if you have been denied public assistance, medical assistance, [food stamp] *or*

*SNAP* benefits or services, or if there is to be a discontinuance, reduction, or suspension in the public assistance, medical assistance, [food stamp] *or SNAP* benefits or services you are receiving, or if there is an increase in the public assistance, medical assistance, or [food stamp] *SNAP* benefits you are receiving, or if there is to be a change in the calculation of such assistance or benefits; or if you are told that you have received an over-issuance of [food stamp] *SNAP* benefits.

(c) Procedures. These regulations set forth what you are required to do to have an action of a social services agency reviewed when you are denied public assistance, medical assistance, [food stamp] *SNAP*, [benefits,] *or HEAP* benefits or services, or when there is a discontinuance, reduction, or suspension in the public assistance, medical assistance, [food stamp] *or SNAP* benefits or services which you are receiving, or when there is an increase in the public assistance, medical assistance, or [food stamps] *SNAP* benefits which you are receiving, or if you are involuntarily discharged from a tier II facility as defined in Part 900 of this Title, or if the social services agency has not acted in a timely manner, or if there is a change in the calculation of such assistance or benefits, or if you are told that you have received an over-issuance of [food stamp] *SNAP* benefits; how to ask for a conference and fair hearing; how to exercise your right to have your public assistance, medical assistance, [food stamp] *or SNAP* benefits or services continued until a hearing decision is issued; how to request another hearing date if you are unable to attend the fair hearing on the day it is scheduled to be held; how to get an interpreter if you do not speak English or if you are deaf; and [who] *whom* you may bring to a conference[,] or fair hearing.

Title 18 NYCRR § 358-2.27 is amended to read as follows:

358-2.27 Food Stamps. Whenever the term food stamps is used in this Part it means [food stamps under the Food Stamp Program and food assistance under the Food Assistance Program as set forth in Part 388 of this Title] *SNAP* benefits.

Title 18 NYCRR § 381.2 is amended to read as follows:

Subdivision (b) of § 381.2 is amended to read as follows:

(b) The office may contract with a public or private entity for a statewide electronic benefit transfer (EBT) system for the distribution of public assistance cash grants and allowances[,] and Federal [food stamp] *Supplemental Nutrition Assistance Program (SNAP)* benefits[,] [State/local food assistance benefits and safety net program benefits] to eligible grantees provided:

Title 18 NYCRR Part 388 is REPEALED.

Title 18 NYCRR Part 651 is amended to read as follows:

Subdivision (a) of § 651.1 is amended to read as follows:

(a) For purposes of preparation of quarterly reports to the Federal Department of Health and Human Services, social services districts must report monthly to the *Office of Temporary and Disability Assistance (the office)* [and the New York State Department of Labor (DOL)] information on each family receiving Federal Temporary Assistance to Needy Families (TANF) benefits, including but not limited to the following:

Paragraph (9) of subdivision (a) of § 651.1 is amended to read as follows:

(9) whether the family received subsidized housing, medical assistance under the State plan approved under title XIX of the Social Security Act, [food stamps] *Supplemental Nutrition Assistance Program (SNAP)* benefits, or subsidized child care, and if the latter two, the amount received;

Subparagraph (iv) of paragraph (11) of subdivision (a) of § 651.1 is amended to read as follows:

(iv) *subsidized* public sector employment, work experience, or community service;

Paragraph (12) of subdivision (a) of § 651.1 is amended to read as follows:

(12) information required by [DOL] *the office* to calculate work participation rates mandated by section 407 of Public Law 104-193 (the Personal Responsibility and Work Opportunity Reconciliation Act of 1996), *as amended by the Deficit Reduction Act of 2005 (Public Law 109-171)*;

Subdivision (b) of § 651.1 is amended to read as follows:

(b) Social services districts must report monthly to the office [and DOL] information on families receiving TANF benefits *and information on families receiving assistance in the safety net program who are required by federal law and regulation to be included in the work participation rates mandated by section 407 of Public Law 104-193 (the Personal Responsibility and Work Opportunity Reconciliation Act of 1996), as amended by the Deficit Reduction Act of 2005 (Public Law 109-171)*, including, but not limited, to the following:

Subdivision (c) of § 651.1 is amended to read as follows:

(c) The information required under this section shall be collected and shall be reported using the Welfare Management System, the Welfare to Work *Caseload Management* System, or other automated systems or reporting forms as determined by the [commissioners] *commissioner* of

the office [and DOL]. Social services districts shall assist [each agency] *the office* in collecting the information in accordance with instructions from the [appropriate agency] *office*.

Title 18 NYCRR § 651.2 is amended to read as follows:

Subdivision (a) of § 651.2 is amended to read as follows:

(a) For purpose of preparation of annual reports for the New York State Legislature, social services districts must report monthly to the office [and DOL] information on families and individuals receiving public assistance benefits, including, but not limited to, the following:

Paragraph (3) of subdivision (a) of § 651.2 is amended to read as follows:

(3) Work activities subsidized or otherwise sponsored by the office[, DOL,] or social services districts, including but not limited to:

Paragraph (11) of subdivision (a) of § 651.2 is REPEALED.

Paragraph (12) of subdivision (a) of § 651.2 is renumbered paragraph (11) of subdivision (a) of § 651.2.

Subdivision (b) of § 651.2 is amended to read as follows:

(b) The information required by this section shall be collected using the Welfare Management System, the Welfare to Work *Caseload Management* System, or other automated systems or forms as determined by the [commissioners] *commissioner* of the office [and the DOL]. Social services districts shall assist [each agency] *the office* in collecting the information in accordance with instructions from the [appropriate agency] *office*.

Paragraph (2) of subdivision (c) of § 651.2 is amended to read as follows:

(2) Unless otherwise required by the Federal Department of Health and Human Services, the sample size shall be limited to the size required under Federal statute for [food stamp program] *SNAP* quality control purposes.

**Text of proposed rule and any required statements and analyses may be obtained from:** Richard P. Rhodes, Jr., Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, NY 12243, (518) 486-7503, email: Richard.Rhodesjr@otda.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Regulatory Impact Statement

##### 1. Statutory authority:

The federal Supplemental Nutrition Assistance Program (SNAP) is authorized by Chapter 51 of Title 7 of the United States Code (U.S.C.). Pursuant to 7 U.S.C. § 2011, the federal SNAP promotes the general welfare and safeguards the health and well-being of the nation's population by raising levels of nutrition among low-income households.

Pursuant to 7 U.S.C. § 2013, the federal Secretary of Agriculture is authorized to administer the federal SNAP, under which, at the request of the State agency, eligible households within the State will be provided an opportunity to obtain SNAP benefits.

Social Services Law (SSL) § 95, as amended by Chapter 41 of the Laws of 2012, authorizes the Office of Temporary and Disability Assistance (OTDA) to administer the SNAP, formerly named the "Food Stamp Program," in New York State and to perform such functions as may be appropriate, permitted or required by or pursuant to federal law.

Former SSL § 95(10)(a) and (e) provided authorization for local social services districts (SSDs) to operate a food assistance program (FAP) in accordance with regulations promulgated by OTDA and federal and State statutory, regulatory, and policy requirements. Pursuant to former SSL § 95(10)(k) and Chapter 360 of the Laws of 2003, this authorization expired on September 30, 2005. Chapter 41 of the Laws of 2012 removed the FAP provisions from SSL § 95.

SSL § 20(3)(d) confers authorization on OTDA generally to establish rules, regulations, and policies necessary to carry out its powers and duties. SSL § 34(3)(f) authorizes OTDA to establish regulations specifically for the administration of public assistance and care within the State, by both the State itself and, on the local level, by the SSDs. Part C of Chapter 57 of the Laws of 2005 transferred responsibility for administration of the public assistance (PA) employment program from the State Department of Labor (DOL) to OTDA, effective April 1, 2005.

##### 2. Legislative objectives:

The proposed amendments would bring the State regulations into compliance with Chapter 41 of the Laws of 2012, which changed the name of the Food Stamp Program to SNAP, and with Chapter 360 of the Laws of 2003, which established a sunset date of September 30, 2005 for the SSDs' authority, as regulated by OTDA, to operate the FAP. The proposed regulatory amendments would also update the State regulations by eliminating the monthly requirement that SSDs report to the DOL information on families receiving PA in order to comply with federal and State reporting requirements, thereby rendering the subject State regulations consistent with Part C of Chapter 57 of the Laws of 2005, which ef-

fectively transferred all functions, powers, duties and obligations incidental to the administration of the PA employment program from the DOL to OTDA.

##### 3. Needs and benefits:

Chapter 41 of the Laws of 2012 changed the name of the Food Stamp Program to the Supplemental Nutrition Assistance Program. References in the regulations to the Food Stamp Program will refer to the Supplemental Nutrition Assistance Program, rendering them consistent with 18 NYCRR § 387.0 and 387.1, which were so amended on September 5, 2012. Chapter 360 of the Laws of 2003 established a sunset date of September 30, 2005 for the SSDs' authority, as regulated by OTDA, to operate the FAP; the proposed regulatory amendments would remove references to the FAP within State regulations, thereby rendering them consistent with current law. Part C of Chapter 57 of the Laws of 2005 transferred all functions, powers, duties and obligations incidental to the administration of the PA employment program from the DOL to OTDA; by eliminating the monthly SSD reporting requirement to the DOL relative to information on PA families incidental to the administration of the PA employment program, the proposed regulatory amendments would render the State regulations consistent with current law.

##### 4. Costs:

It is anticipated that there will be no costs associated with this proposal, since the proposed amendments are intended to: update State regulations to render them consistent with Chapter 41 of the Laws of 2012 relative to the SNAP name change; remove references to the FAP in accordance with Chapter 360 of the Laws of 2003 and Chapter 41 of the Laws of 2012 and render the subject State regulations consistent with 18 NYCRR § 387.0 and 387.1, which were previously amended on September 5, 2012 to reflect the name change to SNAP; and update State regulations by removing the monthly SSD reporting requirement to the DOL in accordance with the transfer of PA employment program oversight from the DOL to OTDA as implemented by Part C of Chapter 57 of the Laws of 2005.

##### 5. Local government mandates:

It is not anticipated that the proposed regulatory amendments will create any new mandates for local governments.

##### 6. Paperwork:

The proposed regulatory amendments will not create any new reporting requirements or additional paperwork.

##### 7. Duplication:

The proposed amendments would not duplicate, overlap or conflict with any existing State or federal statutes or regulations.

##### 8. Alternatives:

An alternative to the proposed amendments would be to retain the existing regulations. However, these regulatory amendments are necessary to bring the State regulations into compliance with SSL § 95 and Chapter 360 of the Laws of 2003, Part C of Chapter 57 of the Laws of 2005, and Chapter 41 of the Laws of 2012.

##### 9. Federal standards:

The proposed amendments are consistent with the federal standards for SNAP and PA.

##### 10. Compliance schedule:

There is no need to establish a compliance schedule because the proposed regulatory amendments would not impose substantive requirements on regulated persons. OTDA will be in compliance with the proposed regulatory amendments on their effective date.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required because the proposed regulatory amendments will neither have an adverse impact upon, nor impose reporting, recordkeeping, or other compliance requirements upon small businesses or local governments. As it was evident from the proposed regulations that they would not have an adverse impact or impose reporting, recordkeeping, or other compliance requirements, no further measures were needed to ascertain those facts and, consequently, none were taken.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required because the proposed regulatory amendments will neither have an adverse impact upon, nor impose reporting, recordkeeping, or other compliance requirements upon public or private entities in rural areas. As it was evident from the proposed regulations that they would not have an adverse impact or impose reporting, recordkeeping, or other compliance requirements, no further measures were needed to ascertain those facts and, consequently, none were taken.

#### Job Impact Statement

A Job Impact Statement is not required for the proposed regulatory amendments. It is apparent from the nature and the purpose of the proposed regulatory amendments that they will not have a substantial adverse impact on jobs and employment opportunities in either the public or private sectors. The proposed regulatory amendments will not affect the jobs of

the workers in the social services districts or the State. These regulatory amendments are necessary to bring the subject State regulations into compliance with Social Services Law § 95 and Chapter 360 of the Laws of 2003, Part C of Chapter 57 of the Laws of 2005, and Chapter 41 of the Laws of 2012. Thus, the proposed regulatory amendments will not have any adverse impact on jobs and employment opportunities in New York State.